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IN THE

Supreme Court of the United States

WALTER RALPH MABRY AND
ANTHONY MICHAEL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the settlement of a bona fide commercial dispute, in the absence of fraud or duress, between a labor official and union employer must contain "some level of structure or formality . . . to evidence the legitimacy of the ensuing payment" in order to qualify for the exception to the Taft-Hartley Act's prohibition against seeking or receiving any "thing of value."

2. Whether a Court of Appeals can deem a statute to be ambiguous in violation of *Watson v. United States*, ignore the rule of lenity in contravention of *United States v. Santos*, and then step into the shoes of the jury and make a factual determination that a criminal defendant's conduct is not exempted by the newly interpreted statutory language.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS.....	2
STATEMENT OF THE CASE	3
Factual Background	4
The Sixth Circuit Panel Majority Opinion.....	7
ARGUMENT FOR ALLOWANCE OF THE WRIT	9
I. The Panel Majority's Interpretation of the Settlement Exception is Wrong and Conflicts with the Department of Labor's Published Guidance.....	9
A. The plain meaning of Section 186(c)(2) exempts from liability all settlements of disputes in the absence of fraud or duress.....	9
B. Published guidance by the United States Department of Labor supports the interpretation mandated by § 186(c)(2)'s plain language.....	10
II. The panel majority flouted this Court's recent directives in *Watson* and *Santos* regarding, respectively, the strict construction of criminal statutes and application of the rule of lenity to ambiguous criminal statutes.....	12

TABLE OF CONTENTS—Continued

Page

A. The panel majority violated *Watson*'s statutory construction principles when it looked outside the statute's plain meaning 12

1. The majority erred by invoking legislative intent 13

2. *Ejusdem generis* is inapplicable 15

3. In its effort to clarify the "absence of fraud or duress" language, the majority opinion added an additional criterion not contemplated by Congress or the Department of Labor 15

B. If the statute's language is ambiguous, as the Sixth Circuit panel majority concluded, *Santos* mandates that the rule of lenity must trump any alternative interpretation 16

III. The Panel Majority's Flawed Opinion has Far-Reaching Consequences 19

IV. By Applying its Novel Interpretation of the Settlement Exception to Defendants, the Panel Majority Relieved the Government of its Burden to Prove Defendants' Guilt Beyond a Reasonable Doubt and Denied Defendants Their Right to Trial by Jury 20

CONCLUSION 23

TABLE OF CONTENTS—Continued

APPENDIX Page

APPENDIX A : *United States v. Walter Ralph Mabry and Anthony Michael*, Cause Nos. 06-2324/06-2327, Panel Opinion (6th Cir. March 3, 2008) 1a

APPENDIX B : *United States v. Walter Ralph Mabry and Anthony Michael*, Cause Nos. 06-2324/06-2327, Denial of Petition for Rehearing (6th Cir. June 30, 2008) 21a

APPENDIX C : *United States of America v. Walter Ralph Mabry, et al.*, Civil Action No. 04-CR-80977, Opinion and Order Granting Plaintiff's Motion for Reconsideration (E.D. Mich. Nov. 17, 2005)..... 23a

APPENDIX D : *United States of America v. Walter Ralph Mabry*, Cause No. 06-2324, Order Staying Mandate (6th Cir. July 17, 2008)..... 37a

APPENDIX E : 29 U.S.C. § 186..... 38a

APPENDIX F : 29 U.S.C. § 432..... 46a

APPENDIX G : 29 U.S.C. § 433 ..... 49a

TABLE OF AUTHORITIES

CASES Page

Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) 18
Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 13
Bollenbach v. United States, 326 U.S. 607 (1946) 22
Hamilton v. Rathbone, 175 U.S. 414 (1899) 13
Iselin v. United States, 270 U.S. 245 (1926) 16
Lamie v. United States Trustee, 540 U.S. 526 (2004) 13, 16
Ratzlaf v. United States, 510 U.S. 135 (1994) 13
Sullivan v. Louisiana, 508 U.S. 275 (1993). 22, 23
United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947) 22
United States v. Booker, 543 U.S. 220 (2005) 20, 21, 23
United States v. Contreras, 950 F.2d 232 (5th Cir. 1991), cert. denied, 504 U.S. 941 (1992) 18
United States v. Donovan, 339 F.2d 404 (7th Cir. 1964), *cert. denied*, 380 U.S. 975 (1965) 21
United States v. Gaudin, 515 U.S. 506 (1995) 21
United States v. Jahagirdar, 466 F.3d 149 (1st Cir. 2006) 18
United States v. Kozminski, 487 U.S. 931 (1988) 18, 19
United States v. Paulton, 540 F.2d 886 (8th Cir. 1976) 21
United States v. Ryan, 350 U.S. 299 (1956) 18

TABLE OF AUTHORITIES—Continued

Page

United States v. Santos, ___ U.S. ___, 128 S. Ct. 2020 (2008) 4, 12, 16, 17, 19, 23
United States v. Smith, 981 F.2d 887 (6th Cir. 1992) 21
Watson v. United States, __ U.S. __, 128 S. Ct. 579 (2007) 3, 12, 13, 14, 15, 23

FEDERAL STATUTES

18 U.S.C. § 371 4
18 U.S.C. § 3231 4
28 U.S.C. §1254(1) 2
29 U.S.C. § 186(a)(2) 2
29 U.S.C. § 186(b)(1) 2
29 U.S.C. § 186(c)(2) ..... *passim*
29 U.S.C. § 186(c)(3) 13, 14
29 U.S.C. §§ 432 11
29 U.S.C. § 432(a)(6) 11
29 U.S.C. § 433 11
29 U.S.C. § 433(a) 11
29 U.S.C. § 439(a)-(c) 11

SECONDARY AUTHORITIES

Note, The New Rule of Lenity, 119 HARV. L. REV. 2420 (2006) 18

RULES

Supreme Court Rule 13.3 2

CONSTITUTIONAL PROVISIONS

Amendment VI 3

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Walter Ralph Mabry and Anthony Michael respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit panel decision (Appx. A at 1a) is reported at 518 F.3d 442 (6th Cir. 2008). The order of the court of appeals denying Defendants' Petitions for Rehearing En Banc (Appx. B at 21a) and the district court's opinions (Appx. C at 23a) are unreported, but can be found online at 2008 U.S. App. LEXIS 14579 (6th Cir. June 30, 2008) and 2005 U.S. Dist. LEXIS 39609 (E.D. Mich. Nov. 17, 2005), respectively.

JURISDICTION

The opinion and judgment of the court of appeals was entered on March 3, 2008. The order denying Defendants' timely petitions for rehearing en banc was entered on June 30, 2008. Pursuant to Supreme Court Rule 13.3, this petition is timely if filed on or before September 29, 2008. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 186(b)(1) of Title 29, United States Code, provides, in relevant part, that "[i]t shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section." 29 U.S.C. § 186(b)(1). Section 186(a) makes unlawful transfers of "any money or other thing of value" from employers "to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce . . ." 29 U.S.C. § 186(a)(2). Section 186(c) provides exemptions to the general prohibition. The prohibition is not applicable "with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress." 29 U.S.C. § 186(c)(2). The relevant statutory provisions are reproduced in the appendix at Appx. E at 38a.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Am. VI.

STATEMENT OF THE CASE

At issue in this case is whether the "settlement exception" to the Taft-Hartley Act's criminal prohibition against the transfers of "things of value" between employers and labor union officials mandates that a "settlement" have "some level of structure or formality" in order to qualify as a "compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress," as was found by the panel majority below. The question presented is purely a matter of the statutory construction of a provision that applies to many thousands of innocent interactions between the persons covered by the Taft-Hartley Act. The novel interpretation by the panel majority below conflicts with the published guidance of the United States Department of Labor and is directly at odds with two very recent decisions of this Court dealing with the strict construction of criminal statutes, *see Watson v. United States*, __ U.S. __, 128 S.Ct. 579 (2007), and the rule of lenity with respect to the construction of

ambiguous criminal statutes, *see United States v. Santos*, ___ U.S. ___, 128 S. Ct. 2020 (2008). These recent decisions, one issued after oral argument below and the other issued after the opinion was published, strongly support the position taken in dissent by Circuit Judge Damon Keith. An exercise of this Court's discretionary review is necessary and appropriate to ensure proper interpretation of a statute with widespread implications and to guarantee Defendants their right to a jury trial. In the alternative, the Court should grant the petition, vacate the judgment, and remand the case to the Sixth Circuit so that it can reconsider its opinion in light of the recent decisions of this Court in *Santos* and *Watson*.

Factual Background

Prior to his conviction in this case, Walter Ralph Mabry ("Mabry") had served for ten years as the Executive Secretary/Treasurer of the Michigan Regional Council of Carpenters and Millwrights ("MRCC"). Anthony Michael ("Michael") served as the President/Executive Director of the MRCC. Mabry and Michael (collectively, "Defendants") were charged in the Eastern District of Michigan[1] on November 29, 2004, with one count of Conspiracy to Solicit and Receive Prohibited Payments in violation of 18 U.S.C. § 371, and one count of Solicitation and Receipt of Prohibited Payments by a Labor Union Official in violation of 29 U.S.C. § 186. Section 186 prohibits, with stated exceptions, the transfer of money or things of value from employers to labor union officials. The indictment counts were based on

[1] Pursuant to 18 U.S.C. § 3231, the district courts of the United States have jurisdiction over violations of Section 186.

"things of value" that allegedly were sought and/or received by the defendants from six employers in 1998-1999 in connection with the construction of a home for Mabry and his family. Only one of the alleged "things of value" – the Nelson Mill transaction – was charged to have been sought or received within the applicable statute of limitations period. It is this dispositive transaction that forms the basis of this petition for certiorari.

In the summer and fall of 1998, union employer Nelson Mill Company ("Nelson Mill") completed finish carpentry work on the Mabry home. A heated dispute arose regarding the fairness of Nelson Mill's initial bill to Mabry for $46,117.45, which Mabry believed and contended was unreasonable, and the parties ultimately settled for the payment of a lesser amount. The indictment charged that the reduced payment violated § 186 as the improper receipt by Mabry of a "thing of value." Because the amount was reduced pursuant to a settled disagreement, however, Defendants have consistently contended that the resolution of the Nelson Mill dispute – the conduct charged in the substantive count of the indictment and included as the last overt act of the conspiracy count – was protected under 29 U.S.C. § 186(c)(2) (the "settlement exception").[2] The district court initially decided that the exception was applicable to the facts of the case and concluded that the jury should be charged accordingly. Following the government's motion for reconsideration, however, the court

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[2] Because the Nelson Mill transaction was the only transaction that occurred within the limitations period, if the resolution of the Nelson Mill dispute is protected by the settlement exception, Defendants' convictions must be reversed in their entirety.

reversed its original ruling and denied Defendants the right to rely on the settlement exception at trial, finding that "Section 186(c)(2) applies only if the parties have reached a resolution of a dispute or claim through the adjudicative process, meaning by a judgment of a court or an arbitrator's award. Section 186(c)(2) offers no protective refuge for any parties that resolve a dispute through independent, informal negotiations held solely between the parties themselves." Appx. 36a. As a result, the government was relieved of its burden to prove that the Nelson Mill settlement was procured through fraud or duress and Defendants were precluded from offering proofs and arguing to the jury, with a proper instruction, that the reduced payment to Nelson Mill was the result of the settlement of a dispute within the meaning of Section 186(c)(2).

The evidence in the record below makes clear that the Mabry/Nelson Mill dispute was genuine, not one "simply" designed to evade the law. Appx. 6a. Moreover, never at any point during the trial or appeal did the government even contend that the settlement was not bona fide or was procured through fraud or duress, as is required by the statute, but rested entirely on its position that only litigated or arbitrated settlements warranted the statute's protection. The government never argued, as the panel majority held below, that the settlement exception required that any "compromise, adjustment, settlement or release" have "some level of structure or formality" to qualify as having been achieved "in the absence of fraud or duress."

Defendants made timely motions for acquittal at the close of the government's proofs, and the district court reserved decision. Defendants renewed their

motions for acquittal after they were convicted on both counts. In their motions, Defendants argued that the settlement exception squarely applied to the only transaction that occurred within the applicable statute of limitations. During the May 22, 2006, oral argument on the motions for acquittal, even without the settlement exception in the case, the district court acknowledged that "this was a case right on the cusp," but nevertheless summarily denied the motions. The court sentenced Mabry to twenty-four months imprisonment and a fine of $50,000. Michael was sentenced to twelve months and one day imprisonment and a fine of $3,000.

The Sixth Circuit Panel Opinion

Defendants appealed to the Sixth Circuit, arguing that the district court erred in ruling that the settlement exception did not include all bona fide "compromise[s], adjustment[s], settlement[s], or release[s] . . . in the absence of fraud or duress" as provided by the plain language of the statute, but rather was limited to dispute resolutions in the context of formal litigation or arbitration. The Sixth Circuit panel majority, in a published opinion, agreed with Defendants that the narrow interpretation of the settlement exception urged by the government and adopted by the district court was wrong. Appx. 5a. But rather than interpret the statute according to its plain terms, the panel majority posited that the exception was ambiguous and that this "ambiguity" could not be resolved through resort to standard statutory interpretation canons. Then, without considering the rule of lenity, the panel majority held that the exception must be interpreted to "require some level of structure or formality in resolving a dispute to evidence the legitimacy of the ensuing

payment," a position that even the government had not advanced. Appx. 8a. Yet, despite its finding of error and its framing of a novel standard, the panel majority did not remand the case for a new trial so that the jury could be instructed on the newly crafted standard. Instead, expressing "no opinion as to what degree of structure must be present to trigger the protection of § 186(c)(2)," the panel majority upheld Defendants' convictions based on its factual finding that the requisite level of structure was "lacking here." Appx. 8a. Judge Keith dissented. He reasoned that "Congress, in setting forth the statutory language, went to great lengths to provide a broader scope for the settlement exception [than simply 'settlement'] using the words 'compromise, 'adjustment,' 'settlement,' 'dispute' and 'claim' – none of which necessitate the initiation of a formal dispute resolution process." Appx. 16a. Moreover, he found that to the extent there was any ambiguity inherent in the text, "the rule of lenity should operate as a tie-breaker in favor of the defendant." Appx. 18a. Judge Keith concluded that "based on the plain language, discernable congressional intent, and the rule of lenity . . . informal settlements of informal disputes are excepted from the general prohibition of § 186 so long as such settlements are made in the absence of fraud or duress." Appx. 19a – 20a.

Defendants filed petitions for rehearing with suggestions for rehearing en banc. Apparently without taking into consideration *Watson v. United States*, decided after oral argument, and *United States v. Santos*, decided after the panel majority's opinion, the Sixth Circuit denied those requests without explanation on June 30, 2008. Appx. B at 21a. By order dated July 17, 2008, the Sixth Circuit's mandate as to Mabry has been stayed pending this

Court's final determination on Defendants' petition for certiorari. Appx. D at 37a.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The panel majority's novel interpretation of the settlement exception is in direct contravention of published guidance of the United States Department of Labor as well as this Court's opinions in *Watson* and *Santos* regarding the primacy of strict construction of criminal statutes generally and the application of the rule of lenity to ambiguous criminal statutes. The panel opinion will needlessly constrain the interactions between employers and labor union officials, and delegates to prosecutors, judges and juries the inherently legislative task of defining what conduct is criminal. Worse still, the panel majority's subsequent fact-finding steps robbed Defendants of their rights to trial by jury and set a dangerous precedent for denial of a jury trial based on an appellate court's assessment of facts from an incomplete trial record.

I. The Panel Majority's Interpretation of the Settlement Exception is Wrong and Conflicts with the Department of Labor's Published Guidance.

A. The plain meaning of Section 186(c)(2) exempts from liability all settlements of disputes in the absence of fraud or duress.

Section 186 outlaws all transfers of money or things of value from employers to union officials. Section 186(c)(2), however, exempts certain payments from this prohibition, including the:

> payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress[.]

29 U.S.C. §186(c)(2).

The plain language of this provision nowhere states that "some level of structure or formality" is necessary to trigger the exemption, as the panel majority held. To the contrary, the provision's language is intentionally broad, encompassing "compromise[s]" "adjustment[s]" and "release[s]" in addition to "settlements" and extending expansively to "any" "claim, complaint, grievance, or dispute." Nor is § 186(c)(2) silent as to the limitations on its scope. Rather, the exemption plainly states that it applies only "in the absence of fraud or duress." Thus, construing the plain language of § 186(c)(2), it is clear that, as the dissent correctly observed, the exception extends broadly to "informal settlements of informal disputes . . . so long as such settlements are made in the absence of fraud or duress." Appx. 19a – 20a.

B. Published guidance by the United States Department of Labor supports the interpretation mandated by § 186(c)(2)'s plain language.

In addition to the criminal prohibitions of Section 186, labor officials and employers are required by law to report to the United States Department of Labor ("DOL") the payment or receipt of "things of value"

between them. 29 U.S.C. §§ 432, 433.[3] The reporting requirement extends to the receipt of "things of value" by the spouse or minor child of a labor official as well. *Id.* Willful violations or false statements in connection with the reports can subject violators to a fine of up to $10,000 and a year in prison. 29 U.S.C. § 439(a)-(c). Specifically exempted from reporting requirements are "payments of the kind referred to in section 186(c)." 29 U.S.C. §§ 432(a)(6), 433(a)(1)(B).

Interpreting § 186(c)(2), the DOL issued guidance on its website providing that an employer is not required to submit a reporting form for a payment made to a union official "to settle a bona fide claim, in the absence of fraud or duress." DOL, "Form LM-10 – Employer Reports Frequently Asked Questions," available at http://www.dol.gov/esa/olms/regs/compliance/LM10_FAQ.htm, last viewed September 22, 2008. A separate category of exempted payments includes a payment "in satisfaction of a judgment or arbitration award." *Id.* In accord with the statute's plain meaning, the DOL guidance correctly provides that the sole limitations on the exception's scope are

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[3] 29 U.S.C. § 432(a)(6) provides that every officer and employee of a labor organization must report to the Secretary of the Department of Labor "a signed report listing and describing for his preceding fiscal year . . . any payment of money or other thing of value (including reimbursed expenses) which he or his spouse or minor child received directly or indirectly from any employer or any person who acts as a labor relations consultant to an employer, except payments of the kinds referred to in section 186(c) of this title." 29 U.S.C. §433(a) provides that every employer who in any fiscal year made "any payment or loan, direct or indirect, of money or other thing of value . . . to any labor organization or officer . . . except payments of the kind referred to in section 186(c) of this title . . . shall file with the Secretary a report . . ."

the requirements that there be a "bona fide claim" and that the settlement be reached "in the absence of fraud or duress." Notably, the DOL guidance says nothing of "structure or formality," the element added to the settlement exception by the panel majority below. Had Mabry or Nelson Mill (or other employers and labor leaders engaged in commercial disputes) consulted the DOL's website prior to settling their dispute, they would have been reassured that their conduct was proper. It is unreasonable for the panel majority to adopt an interpretation of the settlement exception that penalizes conduct that the DOL does not even require labor union officials and employers to report. It is even more unreasonable for the panel majority to retroactively apply this newly defined standard to Defendants.

II. The panel majority flouted this Court's recent directives in *Watson* and *Santos* regarding, respectively, the strict construction of criminal statutes and application of the rule of lenity to ambiguous criminal statutes.

A. The panel majority violated *Watson*'s statutory construction principles when it looked outside the statute's plain meaning.

The Sixth Circuit panel's opinion did not even pretend to analyze the plain meaning of the settlement exception. Rather, it assumed an ambiguity where there was none and looked beyond the four corners of the statute, in effect rewriting the settlement exception to add language found nowhere in the provision. The panel majority's efforts to "trump

ordinary English" by resort to policy-driven statutory construction tools is in clear violation of *Watson*.

The first step in statutory construction "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Judicial construction of an undefined term "has to turn on the language as we normally speak it." *Watson*, __ U.S. __; 128 S. Ct. at 583. It is well-established that when "the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). When the statutory language is clear, courts are precluded from looking into policy rationales and legislative history. *Hamilton v. Rathbone*, 175 U.S. 414 (1899); *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994) ("We do not resort to legislative history to cloud a statutory text that is clear."). Yet, despite the fact that the statutory language of § 186(c)(2) is plain and unambiguous, the panel majority looked beyond the plain language and invoked legislative intent to "infer" the meaning of the settlement exception.

1. The majority erred by invoking legislative intent.

The majority claimed that as part of "protecting the integrity of the collective bargaining process," all of the exceptions to the general prohibition embodied in § 186, save the settlement exception, refer to situations "where the way in which a payment is made evidences its legitimacy under the Taft-Hartley Act." Appx. 6a. As an example, the majority cited § 186(c)(3), which exempts from criminal liability

transactions between employer and union official "at the prevailing market price in the regular course of business." Appx. 7a. There, according to the majority, "[d]ocuments of sale that would normally accompany such a transaction would provide objective evidence that the payment was made for a legitimate purpose." Appx. 7a. As such, claimed the majority, "we can infer that Congress similarly intended that there should be some external evidence of the legitimacy of the payment for a payment to qualify under § 186(c)(2)." Appx. 7a. The panel majority, however, ignored the fact that the statutory requirement that the settlement be in the absence of fraud or duress assures the legitimacy of the protected settlement.

As this Court noted in *Watson*, the panel majority's "policy-driven symmetry" rationale is "underwhelming in a contest with the English language" and the panel majority's attempt to "infer" meaning from the neighboring provisions of § 186(c)(2) "is really an attempt to draw a conclusion too specific from a premise too general." *Watson*, ___ U.S. ___; 128 S.Ct. at 585. Even if the majority were correct, and Congress intended to criminalize all informal dispute resolutions – even those reached in the absence of fraud or duress – that do not bear some hallmark of "structure or formality," Congress was free to say so and it is free to amend Section 186(c)(2) to so provide. *See Watson*, ___ U.S. ___; 128 S.Ct. at 585. As this Court recognized in *Watson*, "law depends on respect for language and would be better served by statutory amendment . . . than by racking statutory language to cover a policy it fails to reach." *Watson*, ___ U.S. ___; 128 S.Ct. at 585.

2. *Ejusdem generis* is inapplicable.

The panel majority employed *ejusdem generis* to interpret the settlement exception, holding that under this canon of statutory interpretation, the statute's protection of payments "in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress" must be "constrained by the specificity of the preceding ones, meaning that the third category must be interpreted to require some level of structure or formality . . . to evidence the legitimacy of the ensuing payment." Appx. 8a. The "legitimacy of the ensuing payment," however, is assured by the need for a bona fide – not trumped-up – dispute, and the requirement that the settlement must be in the "absence of fraud or duress." Moreover, as Judge Keith observes, *ejusdem generis* is "particularly inapplicable here where Congress . . . went to great lengths to provide a broader scope for the settlement exception, using the words 'compromise,' 'adjustment,' 'settlement,' 'dispute,' and 'claim' – none of which necessitate the initiation of a formal dispute resolution process." Appx. 16a. The panel majority's appeal to "policy-driven symmetry" cannot turn "compromise, adjustment, settlement, or release . . . in the absence of fraud or duress" into "settlement with some level of structure or formality." *See Watson*, ___ U.S. ___; 128 S.Ct. at 586.

3. In its effort to clarify the "absence of fraud or duress" language, the majority opinion added an additional criterion not contemplated by Congress or the Department of Labor.

It is a basic tenet of statutory construction that the courts must avoid supplying additional language to

enlarge the reach of a statute. *Iselin v. United States*, 270 U.S. 245, 250-251 (1926). By holding that "some level of structure or formality" is required, the panel majority has not engaged in "construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Lamie*, 540 U.S. at 538 (internal citations omitted). The panel majority's additional language modifies the "any" preceding "claim, complaint, grievance, or dispute" in such a way as to rob the word of its normal, customary meaning. While the level of "structure or formality" might have evidentiary value for the jury in determining whether the dispute was bona fide and the settlement made in the absence of fraud or duress, nothing in the statutory exception makes "structure or formality" a statutorily mandated element to trigger the exception.

B. If the statute's language is ambiguous, as the Sixth Circuit panel majority concluded, *Santos* mandates that the rule of lenity must trump any alternative interpretation.

In *Santos*, this Court held that the "rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Santos*, ___ U.S. ___; 128 S. Ct. at 2025. Indeed, when a term in a criminal statute has two possible meanings, "the tie must go to the defendant" and the more "defendant-friendly" definition must govern. *Id.* Here, the panel majority, on its own reading of § 186(c)(2), concluded that the provision was ambiguous and that its resort to standard canons of statutory interpretation failed to cure the ambiguity. Yet, in contravention of this Court's directives in

Santos, the majority failed even to mention, let alone apply, the rule of lenity.

The panel majority's approach to the interpretation of the settlement exception ignores this Court's explication in *Santos* that "[w]hen interpreting a criminal statute, we do not play the part of a mind reader. In our seminal rule-of-lenity decision, Chief Justice Marshall rejected the impulse to speculate regarding a dubious congressional intent. Probability is not a guide which a court, in construing a penal statute, can safely take." *Santos*, ___ U.S. ___; 128 S.Ct. at 2026 (internal citations omitted). The panel majority interpreted Section 186 in a manner it believed was "consistent with [the statute's] purpose of protecting the integrity of the collective bargaining process." Appx. 6a. In *Santos*, however, this Court flatly rejected a similar interpretative technique, propounded by the government, that statutory ambiguity should be resolved in light of Congress's "presumptive intent to facilitate . . . prosecutions" because the Court is obligated to "interpret ambiguous criminal statutes in favor of defendants, not prosecutors." *Santos*, ___ U.S. ___; 128 S.Ct. at 2028. This Court's opinion in *Santos* confirms Judge Keith's prescient declaration that to the extent there is any ambiguity in the text of the settlement exception, "the rule of lenity should operate as a tie-breaker in favor of the defendant." Appx. 18a.

The panel majority's failure to apply lenity is especially troubling because its interpretation of the settlement exception criminalizes innocent conduct: the resolution of legitimate, private commercial disputes between employers and labor officials – even if such resolutions are reached in the absence of fraud or duress – if those resolutions do not involve

some as yet undefined level of structure or formality to evidence the legitimacy of the ensuing payment. Recent Supreme Court and appeals court jurisprudence make it plain that the rule of lenity is particularly applicable where, as here, the conduct to be criminalized is malum prohibitum. Note, *The New Rule of Lenity,* 119 HARV. L. REV. 2420, 2421, 2428 (2006); *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-704 (2005) (restraint in construing statutes is "particularly appropriate . . . where the act underlying the conviction . . . is by itself innocuous."); *United States v. Kozminski*, 487 U.S. 931, 949-951 (1988) (citing concern that the government's interpretation would criminalize a "broad range of day-to-day activity," court applied the rule of lenity); *United States v. Contreras*, 950 F.2d 232, 244 (5th Cir. 1991), cert. denied, 504 U.S. 941 (1992) (defendant's conduct was not "the sort of arguably innocent behavior the rule of lenity seeks to protect"); *United States v. Jahagirdar*, 466 F.3d 149, 154 (1st Cir. 2006) (noting that the situation was "far from the more troubling case of an ill-defined malum prohibitum violation"). As this Court noted in *United States v. Ryan*, the settlement exception in 29 U.S.C. § 186(c)(2) is part of a malum prohibitum statute. 350 U.S. 299, 305 (1956). Indeed, the settlement exception itself describes behavior that is condoned and even encouraged by our legal system: the private resolution of disputes, without the squandering of limited judicial resources. The universe of innocent interactions criminalized by the majority's ill-defined standard is immense. This case thus presents this Court with the opportunity to recognize explicitly what it has already acknowledged implicitly: that lenity "has special force when innocent conduct is at issue." 119 HARV. L. REV. at 2441.

By ignoring the rule of lenity, the panel majority's decision effectively delegates to "prosecutors and juries the inherently legislative task of determining what type of . . . activities are so morally reprehensible that they should be punished as crimes." *Kozminski*, 487 U.S. at 950. While this may not seem problematic in the context of accepting a suitcase full of cash in a back alley, it is not these hyperbolic cases that constrain a statute's interpretation. As this Court recently recognized in *Santos*, case law often gives "a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. *The lowest common denominator, as it were, must govern.*" *Santos*, ___ U.S. ___; 128 S. Ct. at 2031 (emphasis in original). This Court must require the Sixth Circuit to interpret § 186(c)(2) in a manner comporting with *Santos*.

III. The Panel Majority's Flawed Opinion has Far-Reaching Consequences.

The criminal prohibitions and reporting requirements regulate the daily conduct of thousands of employers and union officials. Indeed, an official of the Carpenters Union cannot build or renovate a house without dealing with an employer or potential employer of members of the Carpenters Union, just as a telecom union official cannot have cellular phone service without contracting with a telecom union employer. Commercial transactions between union officials and employers that are unrelated to the labor/employment relationship are just as likely to lead to bona fide disputes as commercial transactions between other individuals and those same employers. Assume, for example, that a union official hires a

union employer to perform plumbing work on his home. The work is completed, but there is a defect that causes a flood. Or imagine that a restaurant union official receives poor service at a restaurant and complains – and is given a free dessert.

The Sixth Circuit's interpretation of the settlement exception as ambiguous has drastically increased the number of ordinary transactions like these that could be deemed criminal, or at a minimum, be subject to reporting requirements.[4] No longer can labor officials and employers settle bona fide disputes, and rest assured that because the resolution was in the absence of fraud or duress, it need not be reported and does not subject them to criminal liability. Now these individuals must consider, on peril of indictment, whether their "compromise, adjustment, settlement, or release" contained the requisite, but undefined, degree of "structure or formality."

IV. By Applying its Novel Interpretation of the Settlement Exception to Defendants, the Panel Majority Relieved the Government of its Burden to Prove Defendants' Guilt Beyond a Reasonable Doubt and Denied Defendants Their Right to Trial by Jury.

This Court has made clear that the Constitution "protects every criminal defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *United States v. Booker*, 543 U.S. 220,

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[4] A de minimis exception announced on the DOL's website may exempt such low-value items from reporting requirements, however, printed guidance on the DOL's website is cold comfort in the face of a prosecutor armed with the Sixth Circuit panel majority's *Mabry* opinion.

230 (2005). Moreover, this Court has held that the Sixth Amendment requires that criminal convictions rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Id.*; *United States v. Gaudin*, 515 U.S. 506, 510 (1995). The jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence. *Id.* at 515. Furthermore, "where a statutory exception creates an affirmative defense, the ultimate burden of persuasion remains with the prosecution." *United States v. Smith*, 981 F.2d 887, 892 (6th Cir. 1992); *United States v. Donovan*, 339 F.2d 404, 409 (7th Cir. 1964), *cert. denied*, 380 U.S. 975 (1965) (once evidence has been produced that tends to bring a defendant within an exception of 29 U.S.C. § 186, it is incumbent upon the prosecution to negate the applicability of the exception); *United States v. Paulton*, 540 F.2d 886, 892 (8th Cir. 1976). Here, the existence of the facts regarding the Mabry/ Nelson Mill dispute and its settlement was evident from the government's case-in-chief proofs and the government has never asserted, at trial or on this appeal, that the resolution was not the settlement of bona fide dispute in the absence of fraud or duress.

The government was required to negate the affirmative defense by demonstrating to a jury beyond a reasonable doubt that the dispute was not bona fide or that the settlement was the result of fraud or duress. The jury in Defendants' trial, however, never had a chance to consider whether the exception applied to the Nelson Mill settlement because the exception was ruled out of the case by the trial judge before the trial ever began – on a ground that the majority has now rejected. Thus, even if "some level

of structure or formality" was the appropriate requirement, Defendants should have been given the opportunity to demonstrate that the resolution of the Nelson Mill dispute fit into the majority's newly crafted interpretation. Instead of remanding for the jury's consideration, however, the majority, without having the benefit of evidence or argument from Defendants, found that the trial judge was right, albeit for the wrong reasons, and that Defendants were not entitled to put on evidence and require the prosecution to prove that the Nelson Mill settlement did not satisfy the new standard. The panel majority, in effect, directed a verdict of guilt based on its understanding of the facts from a cold, incomplete trial record.

Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the prosecution, no matter how overwhelming the evidence. *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947). As this Court stated in *Bollenbach v. United States*, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in federal court." 326 U.S. 607, 614 (1946).

The majority and, indeed, the government itself, conceded that there was a dispute between Nelson Mill and Mabry regarding the finish carpentry work performed on Mabry's home and that the dispute was resolved by the parties. The majority opinion regarding the settlement exception should have stopped there. The additional fact-finding steps taken by the panel majority resulted in a directed

verdict for the government and violated Defendants' Sixth Amendment right to a jury trial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, this Court, exercising its supervisory power to assure that its rulings are being followed, should grant certiorari, vacate the Sixth Circuit's judgment, and remand the case to the Sixth Circuit for reconsideration in light of this Court's opinions in *Watson* and *Santos* (regarding the application of strict construction and the rule of lenity) and *Booker* and *Sullivan* (regarding the right to a jury trial).

Respectfully submitted,

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September 26, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-2324, 06-2327

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WALTER RALPH MABRY (06-2324);
ANTHONY MICHAEL (06-2327),
Defendants-Appellants.

Argued Oct. 24, 2007
Decided and Filed March 3, 2008

Before: KEITH and ROGERS, *Circuit Judges*; ALDRICH, *District Judge*.

ALDRICH, *D.J.*, delivered the opinion of the court, in which ROGERS, *J.*, joined. KEITH, *J.* (pp. 8-10, delivered a separate opinion concurring in part and dissenting in part.)

OPINION

ANN ALDRICH, *District Judge*.

Defendants-Appellants Walter Ralph Mabry and Anthony Michael were convicted and sentenced for conspiring to solicit and obtain prohibited payments from union contractors, and for soliciting and obtaining such payments, in violation of the Taft-Hartley

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The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

Act, 29 U.S.C. § 186. On appeal, Mabry and Michael argue that (1) the district court erred in ruling that the term "settlement" under 29 U.S.C. § 186(c)(2) is limited to settlements in the context of formal litigation or arbitration; (2) they are entitled to a judgment of acquittal because there was insufficient evidence presented at trial to support a finding that the exception to liability under 29 U.S.C. § 186(c)(3) should not apply; and (3) the district court engaged in unsupported judicial fact finding to arrive at Mabry's sentence. For the reasons discussed below, we affirm the judgment of the district court on all counts, but recognize the possibility of a broader interpretation of "settlement" than that of the district court.

I. Background

A. Factual Background

At all times relevant, defendant-appellant Walter Ralph Mabry was the Executive Secretary-Treasurer of the Michigan Regional Council of Carpenters (MRCC"), and defendant-appellant Anthony Michael was the President and Executive Director of MRCC, reporting directly to Mabry.

Around 1997 or 1998, Mabry decided to build a new house. Several contractors worked on the house, charging significantly less than the prevailing market rate. Of primary concern here is the carpentry work done by the Nelson Mill Company ("Nelson Mill"), a union contractor.[1] In the Spring of 1998, Nelson Mill agreed to complete the interior trim work on Mabry's new house at cost. Nelson Mill began work on the house in August 1998 and presented

[1] Danna Carpentry Contractors, Harris Homes Carpentry, K&R Construction, Brown's Flooring, and Crudo Brothers also performed work on the house, as referenced in Part III, *infra*.

Mabry with an invoice for $46,117.45 when completed. This amount did not include any indirect overhead or profit. Mabry and Michael complained to Nelson Mill about the amount of the bill and asked for a price reduction. Ultimately, Nelson Mill voided the first invoice and prepared a second one for $26,000, which Mabry paid in December 1999. As a result of accepting this lower amount, Nelson Mill suffered a substantial loss on the Mabry job.

B. Procedural Background

On November 29, 2004, a grand jury returned a two-count indictment against Mabry and Michael for (1) conspiracy to solicit and obtain prohibited payments from union contractors in the form of discounts on building materials, labor, and related costs in connection with construction of Mabry's house, in violation of 18 U.S.C. § 371; and (2) soliciting and obtaining a discount of approximately $20,000 from a union contractor in violation of 29 U.S.C. §§ 186(b)(1), (d)(2) and 18 U.S.C. § 2.

On September 19, 2005, Mabry and Michael moved for severance of the two counts, arguing that the exception under 29 U.S.C. § 186(c)(2) applied to the second count. The district court denied the motion for severance, but declared that § 186(c)(2) applied to the informal resolution of the Nelson Mill payment dispute. The Government subsequently filed a motion for reconsideration, arguing that "settlement" under § 186(c)(2) must relate to ongoing litigation or arbitration. On November 17, 2005, the district court granted the Government's motion, holding that

> [§]186(c)(2) applies only if the parties have reached a resolution of a dispute or claim through the adjudicative process, meaning by a judgment of a

> court or an arbitrator's award. Section 186(c)(2) offers no protective refuge for any parties that resolve a dispute through independent, informal negotiations held solely between the parties themselves.

United States v. Mabry, No. 04–CR-80977, 2005 U.S. Dist. LEXIS 39609, at *20 (E.D. Mich. Nov. 17, 2005).

Following conviction by a jury on both counts, Mabry and Michael moved for judgment of acquittal pursuant to Rule 29 on the basis that the exception under § 186(c)(3) should have applied because the Government failed to present sufficient evidence at trial showing that the transactions were not at the prevailing market price. The district court denied their motions on June 1, 2006.

A sentencing hearing was held on September 25, 2006. Mabry was sentenced to concurrent 24-month terms of imprisonment, followed by a three-year term of supervised release, with the condition that he hold no union position. He was also fined $50,000 plus a $200 special assessment. Michael was sentenced to two concurrent one-year-and-one-day terms of imprisonment, followed by a two-year term of supervised release during which he was prohibited from holding a union position. He was fined $3,000, plus a $200 special assessment.

II. Meaning of "settlement" under 29 U.S.C. § 186(c)(2)

We review issues of statutory interpretation de novo. *United States v. Wagner*, 382 F.3d 598, 606-07 (6th Cir. 2004).

Payments between employers and union officials are outlawed by the Taft-Hartley Act, 29 U.S.C. § 186

(2006). However, certain payments between employers and union officials are exempted, including the:

> payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, *settlement*, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress;

29 U.S.C. § 186(c)(2) (2006) (emphasis added). At issue here is whether the term "settlement" under § 186(c)(2) applies to the informal resolution of the Nelson Mill payment dispute.

Mabry asserts that because he paid $26,000 to Nelson Mill in "settlement" of a dispute over the costs of labor and materials, he is exempted from criminal liability pursuant to § 186(c)(2). He asserts that the "or" before "in compromise" is disjunctive, meaning that the word "settlement" applies to settlements made *outside* the context of formal litigation or arbitration. The Government offers a narrower reading of "settlement," arguing that the term should be limited to settlement of an actual controversy that was filed and pending in court, or presented to an arbitrator or impartial adjudicator.[2]

Although we decline to construe the term as narrowly as the Government urges, based upon the purpose, statutory scheme, and language of 29 U.S.C. § 186, "settlement" cannot be construed so broadly as

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[2] On such facts, if the parties ultimately agreed to pay at the prevailing market price, and if the transaction was conducted in the regular course of business, then the exception under 29 U.S.C. § 186(c)(3) would apply, as discussed *infra*.

to include the informal resolution of the Nelson Mill payment dispute.

One of the purposes of enacting § 186 was to combat the corruption of the collective bargaining process that occurs when a union employer gives something of value to a union representative. *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959). This purpose would be undermined if employers and union officials could simply enter into informal agreements, later dispute these agreements, and then make payments in "settlement" of the dispute. To allow such "settlements" to qualify under § 186(c)(2) would nullify "the proscriptive effect of the statute . . . since every payment by an employer to a union could be characterized as a settlement of a claim or demand made by the union." *International Longshoremen's Ass'n v. Seatrain Lines, Inc.*, 326 F.2d 916, 919-20 (2d Cir. 1964).

Consistent with its purpose of protecting the integrity of the collective bargaining process, the statutory scheme of § 186 narrowly defines exceptions to its general prohibition of payments. Section 186(c) provides nine exceptions which serve as affirmative defenses to liability under § 186(a)-(b). Although the exceptions describe a fairly wide range of legal payments between union employers and union officials, there is a common thread. With the potential exception of the present ambiguity under (c)(2), the exceptions to liability under § 186(c) refer to situations where the way in which a payment is made evidences its legitimacy under the Taft-Hartley Act. In other words, the nature of the payments embodied in these exceptions are such that they do not run the risk of corrupting the integrity of the collective bargaining process.

For example, an employer may deduct wages from employees for the payment of union membership dues as long as the employee first authorizes such a deduction in writing. 29 U.S.C. § 186(c)(4). The employee's written assignment of wages provides external evidence that the payment from the employer to the union was made for a legitimate purpose. Similarly, when a union official purchases something from an employer at the prevailing market price in the regular course of business, the collective bargaining process is not harmed. 29 U.S.C. § 186(c)(3). Documents of sale that would normally accompany such a transaction would provide objective evidence that the payment was made for a legitimate purpose. Thus, based upon the underlying purpose of § 186 and the statutory scheme of the exceptions, we can infer that Congress similarly intended that there should be some external evidence of the legitimacy of the payment for a payment to qualify under § 186(c)(2).

It is from this understanding of the purpose and statutory scheme that we now turn to the language of § 186(c)(2) itself. Section 186(c)(2) legalizes three types of payments, all of which are made to resolve some type of dispute: (1) payments in satisfaction of the outcome of litigation, (2) payments in satisfaction of the outcome of arbitration, and (3) payments to otherwise resolve a dispute, in the absence of fraud or duress. The first two categories are specific, referring to structured methods of dispute resolution. In these categories, the presence of a court order or decision of an arbitrator provides evidence of the legitimacy of the payment. The third category, however, is much more general, serving as a statutory catch-all to encompass payments resulting from less structured means of dispute resolution. As a result, determining

whether payments under the third category are legitimate, e.g., in the absence of fraud or duress, presents a much more difficult issue. Fortunately, the pattern of statutory construction present in § 186(c)(2) sheds some light. Where a statute lists specific things followed by a more general one, the canon of *ejusdem generis* provides guidance.

Under *ejusdem generis*, we attribute "the same characteristic of discreteness shared by all the preceding items" to the term in question. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (interpreting "failure to act" as a failure to take an agency action because "failure to act" was constrained by the enumerated agency actions preceding that term in the statute); *Canton Police Benevolent Ass'n of Canton v. United States*, 844 F.2d 1231, 1236 (6th Cir. 1988) (under the "time-honored rule of *ejusdem generis*, . . . a general word in a statute takes its character from the specific words with which it appears").

Applying the canon to § 186(c)(2), the third category must be constrained by the specificity of the preceding ones, meaning that the third category must be interpreted to require some level of structure or formality in resolving a dispute to evidence the legitimacy of the ensuing payment. Although we express no opinion as to what degree of structure must be present to trigger the protection of § 186(c)(2), we are certain that it is lacking here. Accordingly, the informal resolution of the Nelson Mill payment dispute cannot qualify as a "settlement" under § 186(c)(2).

III. Sufficiency of evidence under 29 U.S.C. § 186(c)(3)

We review the district court's denial of the motion for acquittal de novo and "must affirm [the district

court's] decision if the evidence, viewed in the light most favorable to the government, would allow a rational trier of fact to find the defendant guilty beyond a reasonable doubt." *United States v. Canan*, 48 F.3d 954, 962 (6th Cir. 1995).

The exception under § 186(c)(3) provides that payments between union officials and employers are not illegal if they are made "with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business." 29 U.S.C. § 186(c)(3) (2006). When "a criminal statute contains exceptions which take out of the scope of the statute conduct which otherwise would fall within its terms, the prosecution is not required initially to negative the applicability of the exceptions to the case at hand." *United States v. Paulton*, 540 F.2d 886, 892 (8th Cir. 1976). Because § 186 is such a statute, Mabry would have to "come forward with evidence at least sufficient to create a real issue as to whether or not he is entitled to the benefit of the exception which he invokes." *Id.*

At trial, Mabry presented expert testimony establishing a wide range of prevailing market prices for the work performed by Nelson Mill. His expert had solicited bids from a variety of contractors to establish this range. However, because the contractors who submitted bids knew that they would not have to perform at the prices submitted, the bids were nonbinding. Such "bids" are more akin to quotations, which "are generally not a reliable indicator of the prevailing market price. Quotations only propose transactions and do not represent completed arms-length sales." *First Independence Group v. SEC*, 37 F.3d 30, 32 (2d Cir. 1994). Thus we are not persuaded

by Mabry's method of establishing the prevailing market price.

At a minimum, the prevailing market price should cover the contractor's costs. *See id.* At trial, the Government presented testimony that Mabry paid less than cost on the transactions with Harris Homes Carpentry, K&R Construction, Brown's Flooring, and Nelson Mill. The Government also presented testimony that the payment offered to Danna Carpentry was lower than the costs Danna anticipated paying its employees. Based on this evidence, a rational trier of fact could conclude beyond a reasonable doubt that because Mabry paid less than cost on the enumerated transactions, he did not make payments at the prevailing market price. Further, his reliance on the non-binding bids obtained by his expert is not sufficient evidence to create a real issue as to whether or not he is entitled to the benefit of § 186(c)(3). Therefore, the district court's denial of the motion for acquittal is affirmed.[3]

IV. Sentencing

Mabry and Michael challenge their sentences on the basis that (1) the district court's calculation of improper benefit was not supported by the evidence, and (2) the sentencing violated *United States v.*

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[3] In the alternative, the Government argues that for a transaction to fall under the § 186(c)(3) exception, it must not only be at the prevailing market price, but also be done "in the regular course of business." Mabry objects to this interpretation, instead reading the provision to essentially mean that the prevailing market price should be established based on transactions occurring "in the regular course of business." Because the Government presented sufficient evidence that the transactions were not conducted at the prevailing market price, we need not reach this issue.

Booker, 543 U.S. 220 (2005) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

A. Improper Benefit

We are obliged to set aside the district court's factual findings regarding improper benefit based upon § 2F1.1(b) of the United States Sentencing Guidelines ("U.S.S.G.") only if those findings are clearly erroneous. *United States v. Ware*, 282 F.3d 902, 907 (6th Cir. 2002). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

The sentences received by both Mabry and Michael were dependent upon the amount of improper benefit that Mabry received in the construction of his house. Mabry argues that because the jury did not determine the amount of value Mabry received from the construction of his house, the district court's finding of improper benefit was not supported by the evidence.

At the sentencing hearing, the district court explained that the jury's guilty verdict demonstrated that the jury had found that Mabry had received a thing of value from the construction of his house. Relying on the trial testimony, the district court then computed the amount of improper benefit by subtracting what the various subcontractors were actually paid from the amount that they should have been paid. Taken altogether, the district court found the total improper benefit to be $127,800.00, which justified increasing the offense level by 7 under U.S.S.G. § 2F1.1(b)(1)(H).[4] Having

[4] The 1998 edition of the U.S.S.G. Manual was used.

reviewed the sentencing transcript, we are not left with a definite and firm conviction that a mistake has been committed. Accordingly, we affirm the district court's finding of improper benefit.

B. Booker and Apprendi Issues

We review *Booker* and *Apprendi* sentencing issues de novo. *United States v. Johnson*, 440 F.3d 832, 847 (6th Cir. 2006); *United States v. Till*, 434 F.3d 880, 885-886 (6th Cir. 2006).

Section 186(d)(2) provides a one-year statutory maximum sentence if the violations of § 186(a)-(c) do not exceed $1,000. However, if a defendant stipulates to the relevant facts, the government can seek judicial sentence enhancements. *Blakely v. Washington*, 542 U.S. 296, 310 (2004).

Mabry argues that the district court could impose a sentence greater than the statutory maximum only if he had admitted, or the jury had found beyond a reasonable doubt, that he received a thing of value in excess of $1,000. However, at the jury instructions conference, Mabry's counsel stipulated that if the jury returned a verdict of guilty, it would be presumed that Mabry had received a thing of value of at least one thousand dollars. Because Mabry stipulated that a guilty verdict would mean that the violations of § 186(a)-(c) exceeded $1,000, we affirm the district court's sentences of both Mabry and Michael.[5]

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[5] We note that there is a difference between "not exceeding $1,000" and "at least $1,000." This linguistic discrepancy arises from a misstatement by the Government at the jury instructions conference. As the transcript clearly shows, the intent of the stipulation was that if the jury returned a guilty verdict, it would indicate that the defendants were guilty of a felony, not a misdemeanor. (J.A. 1600-1606.) The mere fact that the Govern-

V. Conclusion

For the reasons discussed above, the conviction and sentence of the district court are affirmed.

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ment misquoted the statute is not of significance here, and Mabry has not argued the point.

DAMON J. KEITH, Circuit Judge, concurring in part and dissenting in part. I concur with the majority's decision that there was sufficient evidence to support a finding that the exception under 29 U.S.C. § 186(c)(3) does not exempt Appellants from criminal liability. I also agree that the district court did not engage in impermissible judicial fact finding to arrive at Mabry's sentence. I disagree, however, with the majority's determination that in order for the "settlement exception," 29 U.S.C. § 186(c)(2), to apply, the parties must have initiated a structured dispute resolution process.

The crux of the matter is whether 29 U.S.C. § 186(c)(2) provides an exception to the general prohibition against payments between employers and union officials in the context of settlements outside of a formal dispute resolution process. The text of the (c)(2) exception exempts:

> [T]he payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress . . . .

This settlement exception clearly includes payments between employers and union officials in response to court or arbitrator-ordered awards, but it is the ambit of the last phrase "in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress" to which I now turn.

The first step in interpreting any statute is to determine whether "the language at issue has a plain

and unambiguous meaning." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil*, 519 U.S. 337, 340 (1997)); *see also Fullencamp v. Veneman*, 383 F.3d 478 (6th Cir. 2004). If the "statutory language is unambiguous and 'the statutory scheme is coherent and consistent,'" then "[o]ur inquiry must cease." *Robinson*, 519 U.S. at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)). Here, the plain meaning of the words "in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute" does not require that the settlement of such disputes occur in the context of formal litigation or arbitration. In particular, the words "compromise," "adjustment," "settlement," and "dispute" do not necessarily relate to litigation or arbitration. These words refer to the settlement or conclusion of a disagreement, with no express reference to formal proceedings. Moreover, the definitions of "claim" in Webster's Third New International Dictionary (1986) are "an authoritative or challenging request," "a demand of a right or supposed right," and "a calling on another for something due or supposed to be due."[6] All three definitions place Defendant Mabry's dispute as to the amount owed squarely within the plain meaning of "claim." Given the broad language used to describe the types of settlements exempted within §

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[6] The definition of "claim" in Black's Law Dictionary (8th ed. 2004), though including the concept of formal litigation, also encompasses informal disputes that do not necessarily involve litigation or arbitration. The definitions are: "1. The aggregate of operative facts giving rise to a right enforceable by a court . . . 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional . . . 3. A demand for money, property, or a legal remedy to which one asserts a right . . ."

186(c)(2), a plain reading of the statute allows an exemption to § 186 for the settlement of informal disputes made in the absence of fraud or duress.

The majority, however, relies upon *ejusdem generis*, an interpretive aid in statutory construction, to find that part one of § 186(c)(2), allowing for an exception where payment is given upon "satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman," modifies part two, which exempts payment "in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress." However, *ejusdem generis* "cannot be employed to render general words meaningless." *United States v. Alpers*, 338 U.S. 680, 682 (1950); *accord Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084, 1097 n.3 (6th Cir. 1981). The principle of *ejusdem generis* is particularly inapplicable here where Congress, in setting forth the statutory language, went to great lengths to provide a broader scope for the settlement exception, using the words "compromise," "adjustment," "settlement," "dispute," and "claim"—none of which necessitate the initiation of a formal dispute resolution process.

In the majority's view, however, "some level of structure or formality in resolving a dispute to evidence the legitimacy of the ensuing payment" is required, and [a]lthough [they] express no opinion as to what degree of structure must be present to trigger the protection of § 186(c)(2), [they] are certain that it is lacking here." Even though the majority's interpretation of § 186(c)(2) does not explicitly require litigation or arbitration to validate a settlement, it renders the import of its decision unclear and will likely lead to further confusion. The majority's imprecise reading of the statute, coupled with its explicit refusal to decide what ac-

tions are necessary to trigger the settlement exception, seem to suggest that even bona fide settlements of real disputes are subject to criminal sanction simply because the parties did not sue each other or initiate arbitration. I believe that a better construction of the statute would allow parties with bona fide disputes to settle their claims, without resorting to litigation or arbitration, so long as that settlement is "in the absence of fraud or duress." Such a reading would avoid the problems inherent in the majority's interpretation, which effectively reads out key language in § 186(c)(2).

Moreover, this interpretation would harmonize the plain language of § 186(c)(2), which includes informal settlements, with the overall purpose of § 186. As the majority correctly states, the legislative purpose of § 186 was to combat corruption within the collective bargaining process by imposing criminal sanctions on union officials who receive payments from employers. *See e.g., Arroyo v. United States*, 359 U.S. 419, 424-25 (1959). The legislature's remedial purpose, however, should be harmonized with an exception whose plain meaning allows the receipt of things of value to settle informal disputes. Indeed, allowing parties to amicably settle their disputes would not, in effect, swallow the entire statute because the parameters of that exception are *written into § 186(c)(2) itself*—"in the absence of fraud or duress." That limiting language provides an end point for § 186(c)(2) and affords a precise fit between the contours of the corrupt activity prohibited by § 186 and the exception given to the settlement of bona fide disputes in § 186(c)(2).

Furthermore, despite Congress's explicit displeasure with corruption within the collective bargaining process, it is not at all clear that Congress meant to

criminalize such a broad swathe of potentially legitimate activity. "[I]f Congress had intended to [criminalize such conduct], and to subject [offenders of the prohibition] to lengthy prison terms, it would have spoken more clearly to that effect." *Staples v. United States*, 511 U.S. 600, 620 (1994). In other words, if Congress had intended to require union officials to initiate formal proceedings for the settlement exception to apply, Congress would have said so. The absence of the words "formal litigation" or "arbitration" and the insertion of the words "claim" and "dispute" into the second section of § 186(c)(2) suggests that Congress did not actually intend to require union officials and employers to engage in formal adjudicative processes to avoid criminal liability. The requirement was only that the claim and its settlement be bona fide, i.e., "in the absence of fraud or duress." Thus, the plain language of the statute together with the discernable congressional intent of § 186 suggest that § 186(c)(2), the settlement exception, should be read to allow the settlement of bona fide disputes between an employer and a union official as long as both the dispute and settlement are in the absence of fraud or duress.

Moreover, to the extent that there exists any ambiguity in the meaning of § 186(c)(2), the rule of lenity should operate as a tie-breaker in favor of the defendant. The rule of lenity is a longstanding principle of statutory construction directing that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)); *see also*

Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409 (2003); *United States v. Wiltberger* 18 U.S. 76, 95 (1820); 3 N. Singer, Sutherland Stat. Const. (6th ed. 2007) (stating that lenity is "an ancient rule of statutory construction that penal statutes should be strictly construed against the government . . . and in favor of the persons on whom such penalties are sought to be imposed.").

The purpose of lenity is, first, to allow a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *N. Am. Van Lines v. United States*, 243 F.2d 693, 697 (1957). *See also United States v. Boucha*, 236 F.3d 768, 774 (6th Cir. 2001). Second, lenity operates to assuage "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Boucha*, 236 F.3d at 774 (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)). Thus, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

Here, to the extent that the majority's interpretation also represents a plausible reading of § 186(c)(2), the language and intent of the settlement exception is not sufficiently clear to warrant such a narrow interpretation of the exception under § 186(c)(2). I am loath to inflict criminal punishment on those who engage in the amicable settlement of bona fide disputes where the plain language of § 186(c)(2) exempts from liability informal settlements of disputes between employers and union officials.

Thus, based on the plain language, discernible congressional intent, and rule of lenity, I believe that the appropriate interpretation of § 186(c)(2) is that in-

formal settlements of informal disputes are excepted from the general prohibition of § 186 so long as such settlements are made in the absence of fraud or duress. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed June 30, 2008]

Nos. 06-2324/2327

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WALTER RALPH MABRY and ANTHONY MICHAEL,
Defendants-Appellants.

BEFORE: KEITH and ROGERS, *Circuit Judges*; and ALDRICH,* *District Judge*.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

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* Hon. Ann Aldrich, Senior United States District Judge for the Northern District of Ohio, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 04-CR-80977

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WALTER MABRY, *et al.*,
Defendants.

HON. BERNARD A. FRIEDMAN

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION, BY FINDING THAT 29 U.S.C. § 186(C)(2) APPLIES ONLY TO SETTLEMENTS REACHED THROUGH LITIGATION OR ARBITRATION

This matter is presently before the Court on Plaintiff's Motion for Reconsideration. On September 26, 2005, the Court ruled that 29 U.S.C. § 186(c)(2) applies to any settlement of a dispute that is reached between two parties, regardless of whether those parties were involved in litigation or arbitration. Plaintiff asks the Court to reconsider its decision and to instead find that Section 186(c)(2) does not apply to a settlement or resolution that is reached through merely informal or non-judicial negotiation, held solely between the parties themselves.

After having reviewed this matter in greater depth, the Court reverses its original ruling. Therefore, the Court finds that 29 U.S.C. § 186(c)(2) applies only to a settlement of a dispute when that settlement is achieved through the adjudicative process.

I. SECTION 186 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 ("TAFT-HARTLEY ACT")

Section 186 of the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley Act"), 29 U.S.C. §§ 141 to 187, restricts financial transactions between an employer and a labor organization's representatives or employees. 29 U.S.C. § 186 (1998)[1]. The statute states:

> It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;

Id. at § 186(a). The statute further prohibits any request for, or acceptance of, such prohibited transactions: "It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of

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[1] It should be noted that 29 U.S.C. § 186 is the codification of Section 302 of the Labor Management Relations Act.

any money or other thing of value prohibited by subsection (a) of this section." *Id.* at § 186(b)(1).

However, Section 186 does allow for nine narrow exceptions, where conduct that would otherwise be considered illegal is instead deemed to be lawful. One of these nine exceptions is Section 186(c)(2), which allows for transactions "with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress." *Id.* at § 186(c)(2).

The interpretation of Section 186(c)(2) is the issue for reconsideration before this Court. On one hand, Plaintiff argues that this exception narrowly applies to disputes or claims in a labor-management context, not to mere commercial exchanges between parties. Further, Plaintiff argues that any settlement of a dispute or claim must have been achieved through an adjudicative process, such as ongoing litigation or arbitration between the parties. On the other hand, Defendants assert that the exception's plain language shows that it applies to either a commercial or labor-management context, as long as the payment or other thing of value serves as a settlement or resolution of a claim or dispute between the parties. As Defendants explain, this would mean that a payment between an employer and union officials, as long as it was the result of a voluntary settlement of a dispute between them, should be considered lawful under Section 186(c)(2).

II. PLAINTIFF'S MOTION FOR RECONSIDERATION

Our judicial system places a strong emphasis on the efficient and fair resolution of disputes. Sometimes parties can resolve their disputes on their own, independent of the court system. In such a case, we often applaud the parties for being able and willing to settle their problems without having to immerse themselves amidst depositions, motions, and trial dates. Even more so, parties that avoid needless litigation better serve us all, by allowing those who truly require the direction of our courts to achieve justice more quickly.

There are some situations, though, where parties cannot voluntarily opt to operate outside the bounds of our legal system, even if they so desire. In such cases, it is often the parties' heavy fiduciary duties, as well as the possibility to abuse those duties, that causes lawmakers to impose a higher burden on those involved. The arena of collective bargaining seems to be one of these special areas. For instance, the United States Supreme Court has explained that Section 186 was created "to deal with problems *peculiar* to collective bargaining" and "was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process." *Arroyo v. United States*, 359 U.S. 419, 424-25 (1959) (emphasis added). Similarly, the Sixth Circuit explained that Section 186 "was enacted to deal with problems *peculiar* to labor-management relations." *Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981) (emphasis added). *See also United Bhd. of Carpenters and Joiners of Am., Dresden Local No. 267 v. Ohio Carpenters Health and Welfare Fund*, 926 F.2d 550, 557 (6th Cir.

1991) (stating "Section 186 as a whole is concerned . . . with any financial transactions between employers and unions, which can be corrupting").

Although many of the Section 186 cases involve employer payments to union trust funds or an employer's withholding of employees' union dues as check-off payments, several courts have echoed the Supreme Court and Sixth Circuit's language regarding the unique fiduciary nature of collective bargaining and the purpose of Section 186. For instance, the Eastern District of Michigan demonstrated its awareness of the risk that the collective bargaining process can lend itself to possible abuse:

> Because of the abuses that have occurred in the cauldron of labor-management interplay which include misuse of labor organization funds, extortion by labor personnel, and attempts by business personnel to influence or exert pressure on union "personnel" particularly in financial form, restrictions on conduct between these two bodies and certain of their representatives have been imposed by Congress.

Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp., 463 F.Supp. 643, 645 (E.D. Mich. 1978) (Kennedy, J.) (quoting *Costello v. Lipsitz*, 547 F.2d 1267, 1272 (5th Cir. 1977)), *aff'd*, 634 F.2d 258 (6th Cir. 1981). Likewise, the District of Columbia Court of Appeals stated that "[a]n important purpose of the LMRA was to prohibit special payments by employers and employer associations to employees, employee organizations, and officers of such organizations, except on conditions carefully prescribed by law." *Wash. Post v. Wash.-Balt. Newspaper Guild, Local 35*, 787 F.2d 604, 607 (D.C. Cir. 1986). Similarly, the Fifth Circuit Court of Appeals explained that "the purpose

of § 302(a) [§ 186(a)] is to protect employers from extortion and to insure honest, uninfluenced representation of employees." *United Steelworkers of Am., AFL-CIO v. United States Gypsum Co.*, 492 F.2d 713, 734 (5th Cir. 1974). In similar fashion, the Eastern District of Pennsylvania found that Section 186's "manifest purpose [was] to frustrate illicit employer-union links." *Salvucci v. Gravure Div. of Triangle Publ'ns, Inc.*, 494 F.Supp. 126, 130 (E.D. Pa. 1980), *affd*, 649 F.2d 860 (3rd Cir. 1981). Thus, it is evident that Section 186 was intended to rein in the abuse and corruption that had arisen in the labor-management context, to protect against further dishonest conduct, and to help strengthen the fiduciary obligations owed by union representatives to their members.

In fact, a union representative can violate Section 186 without ever having intended to do so, which further underlines the high sensitivity to any possible improper conduct by union representatives. The United States Supreme Court seems to take somewhat of a strict liability approach to violations of Section 186, as evidenced by the following language: "As the statute reads, it appears to be a criminal provision, malum prohibitum, which outlaws all payments, with stated exceptions, between employer and representative." *United States v. Ryan*, 350 U.S. 299, 305 (1956). The Sixth Circuit further held that "[t]he fact that willful violations of [Section 186) are to be met with a criminal sanction does not render an unwitting violation lawful. Congress need not prescribe a criminal penalty, or any penalty for that matter, to make an action illegal." *Jackson Purchase Rural Elec. Coop. Ass'n v. Local Union 816*, 646 F.2d 264, 266 (6th Cir. 1981). Similarly, the Second Circuit stated that "[t]he prohibitory sweep of the

statute encompasses more than conscious wrongdoing." *Int'l Longshoremen's Ass'n, AFL-CIO v. Seatrain Lines, Inc.*, 326 F.2d 916, 919 (2d Cir. 1964). Thus, any payment in violation of Section 186(a) or (b) that does not fall within one of the exceptions of Section 186(c) is considered to be unlawful, regardless of the parties' intentions.

Moreover, the risk of *conscious* wrongdoing between employers and union representatives seems to be an even greater concern than the unintentional, yet still unlawful, violations of Section 186. For instance, in *Seatrain Lines*, the Second Circuit faced a situation where the employer's use of pre-loaded cargo containers reduced the number of hours that union employees needed to work, so the union representatives demanded that the employer make payments to the union to compensate it for the loss of revenue derived from the employees' union dues. *See id.* at 918. The two parties disagreed about the payments, but the employer eventually agreed to pay a fee to the union for each pre-loaded cargo container, and it began making payments to a trust fund, pending a federal court's determination as to the legality of such payments. *See id.* The union contended that such an agreement, which settled the dispute between the parties, fell within the Section 186(c)(2) exception of an otherwise prohibited financial transaction. *See id.*

The Second Circuit held that such a voluntary agreement or compromise between the parties cannot "be considered a settlement of a claim within the meaning of the exception established by Section 302(c)(2) [Section 186(c)(2)]." *Id.* at 919. The court warned that "if the ILA's [union's] argument were accepted the proscriptive effect of the statute would be nullified, since every payment by an employer to a

union could be characterized as a settlement of a claim or demand made by the union." *Id.* at 919-20.[2] *See also N.Y. Tel. Co. v. Communications Workers of Am. Local 1100*, 256 F.3d 89, 92 (2d Cir. 2001) (citing same). The parties are therefore barred from merely pronouncing that they have independently settled a dispute by devising an agreement calling for employer payments to union officials, for such a non-adjudicative resolution is too prone to serve as a disguise for what is actually improper conduct. Thus, the scrutiny of a court or arbitrator is required in order for Section 186(c)(2) to apply to such employer payments made to unions or union officials.

Likewise, the First Circuit addressed concerns about parties that cloak improper conduct in the disguise of a dispute settlement. In *Labor Relations*

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[2] The Second Circuit further held that "whenever some other provision of Section 302(c) [Section 186(c)] provides a more particularized exception, the transaction must satisfy the requirements of that other exception to be exempt." *Seatrain Lines*, 326 F.2d at 920. Therefore, in *Seatrain Lines*, the court found:

> [C]ontributions to union welfare funds which have been made pursuant to a collective bargaining agreement or an arbitration award, and might therefore be thought to fall within the exceptions of Section 302(c)(2) [Section 186(c)(2)], are to be scrutinized under the standards set out in Section 302(c)(5) [Section 186(c)(5)], which provides a particularized exception for payments to certain trust funds.

Id. However, the court ultimately found that the payments violated Section 186(c)(4), as that was the most particularized exception pertaining to the employer's payments "in lieu of a dues check-off." *Id.*

This Court finds the reasoning of the Second Circuit to be persuasive; however, the Court will not, at this time, determine if Section 186(c)(2) is the narrowest, most particularized exception that applies to the payments at issue in the instant case.

Division of Construction Industries of Massachusetts, Inc. v. Teamsters Local 379, the court of appeals ruled that employer payments of fringe benefits to a union, even when made pursuant to a collective bargaining agreement, can still be prohibited under Section 186. 156 F.3d 13, 15-16 (1st Cir. 1998). The First Circuit found that Section 186(c)(2) did not apply, even though the contract was interpreted by an arbitrator, because the employer payments were not made in settlement or compromise of a claim or dispute, but instead were required payments under a previously negotiated collective bargaining contract. *See Teamsters Local 379*, 156 F.3d at 16. The court explained that allowing such a scheme to be excepted from Section 186 would mean that "any employer and union wishing to circumvent section 302's [Section 186's] prohibition on direct payments to labor organizations could simply contract to do so in plain terms, and then engage an arbitrator to interpret that contract. We decline to read such an enormous loophole into the statute against its plain language." *Id.* Thus, the court re-emphasized that ongoing litigation or arbitration must directly precede any settlement between the parties.

Similarly, the Northern District of Ohio, in *Humility of Mary Health Partners v. Local 377 Chauffeurs, Teamsters, Warehousemen, and Helpers of America*, also recognized that improper employer payments to unions could be dressed up as settlements of disputes; however, the court found that "this concern is obviated . . . [where such payments are made] pursuant to a validly issued arbitral award." 296 F.Supp.2d 840, 848 (N.D. Ohio 2003). The court reasoned that "the Award greatly diminishes the opportunity for malfeasance by implementing a cooperative payment process and retaining the arbitra-

tor's continuing jurisdiction over the actual payment." *Id.* Thus, in order to be excepted under Section 186(c)(2), the court calls for ongoing litigation or arbitration to ensure the integrity of the settlement and to allow for adjudicative scrutiny. It seems that court judgments or arbitration awards, as long as preceded by that judicial body's examination of the specific circumstances and ongoing dispute, are the only means by which such employer payments will be deemed lawful conduct under Section 186(c)(2)'s protection.

This Court finds such reasoning to be persuasive. In the labor-management context, the parties have high fiduciary duties and an accompanied risk of abuse. Section 186 was designed to prevent such fiduciary abuses by imposing a heavy burden on both parties when it comes to the settlement of a dispute or claim. While in other contexts the parties may be able to resolve such disputes on their own time, Section 186(c)(2) requires that the disputing parties either file a lawsuit or enter arbitration, where adjudicative scrutiny can be duly paid to the circumstances at hand.

Defendants, however, argue that the plain language of Section 186(c)(2) allows for voluntary settlements of claims or disputes that are reached by the parties themselves, without the oversight of a court or arbitration. Defendants cite to *White v. National Football League*, 836 F.Supp. 1458 (D. Minn. 1993). In *White*, the court found that "in the absence of fraud or duress, section 302(c)(2) [Section 186(c)(2)] does not require the court to examine the actual terms of a settlement of legitimate claims for purposes of determining whether such consideration is 'fair.'" 836 F.Supp. at 1494. Moreover, the court ruled

that "[t]he general prohibition [of Section 186] is subject to express statutory exceptions set forth in section 302(c) of the Act, 29 U.S.C. § 186(c). Congress did not intend that the general prohibition prevent a union or employee representative from vindicating its legal rights as to an employer, and thus enacted the settlement exception, section 302(c)(2) [Section 186(c)(2)], which exempts adjudicated awards and judgments, and also payments arising out of the voluntary settlement of claims and disputes, from the general prohibitions of the Act." *Id.* at 1493. Thus, Defendants argue that Section 186(c)(2) applies to any "payment or delivery of any money or other thing of value . . . in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress[,]" regardless of whether that resolution is reached by the parties themselves or through an adjudicated award or judgment. *See* 29 U.S.C. § 186(c)(2).

This Court does not find Defendants' argument to be persuasive for several reasons. First, the parties in *White* had been involved in ongoing, vigorous litigation over the past few years. In fact, the court states that "[n]one of the parties or objectors . . . dispute that the licensing litigation settlement resolves a wide range of genuine legal controversies between the NFL [employer] and the NFLPA [union]." *White*, 836 F.Supp. at 1493. There is an established record of litigation, involvement by the court, and an actual "legal" dispute. Thus, it follows that the "voluntary settlement" language mentioned in *White* does not refer to any "voluntary settlement" that the parties may assert, but instead to a "voluntary settlement of claims and disputes" between these two parties that were involved in ongoing, extensive litigation. *See id.*

Second, it would pave the way for the exception to swallow the rule if one interprets Section 186(c)(2) as allowing *any* "compromise, adjustment, settlement, or release of any claim." As the Sixth Circuit explained, "[u]nder accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Lake Cumberland Trust, Inc. v. United States Envtl. Prot. Agency*, 954 F.2d 1218, 1222 (6th Cir. 1992). The Defendants' interpretation of Section 186(c)(2) would, in effect, render language in the first half of the exception—requiring a "judgment of any court" or "decision or award of an arbitrator"—to be meaningless, for any employer and union official could avoid the exception's requirements by disguising an improper payment as their independent resolution of a purported dispute. Thus, the statute should be read to apply only to a settlement reached through an adjudicative judgment or award, for that interpretation breathes meaning into each word and provision of the exception.

Further, the final half of Section 186(c)(2)—"or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress"—surely relates back to the first half of the exception, which states "the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman." *See* 29 U.S.C § I 86(c)(2). To interpret the section as three separate parts—a court judgment, an arbitrator award, or any settlement whatsoever—would mean that the lawmakers included subsets of

lawful conduct in the first half of Section 186(c)(2) but then put in the all-inclusive, overarching umbrella of any "compromise, adjustment, settlement, or release" in the last half of the section. This seems nonsensical, as the lawmakers would have just eliminated the first half of the exception—requiring an adjudicated judgment or award—and merely stated that any "compromise, adjustment, settlement, or release" reached by the parties was sufficient to qualify as excused conduct under Section 186(c)(2). This is not how the lawmakers constructed Section 186(c)(2), and the exception should therefore be interpreted to be consistent with its construction.

Third, the terms included in the second half of Section 186(c)(2)—"any claim, complaint, grievance, or dispute"—are indicative of the adjudicative process. Although the Defendants point out that these terms can also carry non-labor meanings, the rub is that they are all legal terms, consistently used within the context of courtrooms and arbitration panels. Thus, the selection of these terms further strengthens the statutory interpretation that any settlement or resolution must be achieved through an adjudicative process.

Lastly, as previously described, Section 186 was enacted amidst concerns of corruption and fiduciary abuse percolating between employers and union representatives. Section 186 sought to grab the bull by the horns by expressly prohibiting improper payments in the labor-management context, save a few narrow exceptions. To allow an employer and union representative to disguise an improper financial transaction as a settlement of a purported dispute would be a disservice both to the lawmakers who drafted the section, the public, and to the union

employees who are the ones, in the end, shortchanged by such malfeasance. Thus, Section 186(c)(2) places a heavy burden on any employer and union representative who engage in such conduct. Litigation, coupled with adjudicative scrutiny, ensures that the union representatives are acting with integrity, loyalty, and uninfluenced representation of the union employees' best interests.

III. CONCLUSION

Based upon statutory interpretation, existing case law, and integrity of labor-management relations, this Court grants the Plaintiff's Motion for Reconsideration. For the reasons stated above, the Court reverses its original ruling on this matter. Accordingly,

IT IS ORDERED that Section 186(c)(2) applies only if the parties have reached a resolution of a dispute or claim through the adjudicative process, meaning by a judgment of a court or an arbitrator's award. Section 186(c)(2) offers no protective refuge for any parties that resolve a dispute through independent, informal negotiations held solely between the parties themselves.

/s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
CHIEF UNITED STATES DISTRICT JUDGE

Dated: November 17, 2005
Detroit, Michigan

I hereby certify that a copy of the foregoing document was served upon counsel of record on November 17, 2005, by electronic and/or ordinary mail.

/s/ Carol Mullins
Case Manager

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 06-2324

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WALTER RALPH MABRY,
Defendant-Appellant.

ORDER

BEFORE: KEITH, *Circuit Judge*; ROGERS, *Circuit Judge*; ALDRICH[1], U.S. District Judge;

Upon consideration of the appellant's motion to stay mandate,

It is ORDERED that the mandate be stayed to allow the appellant time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

Issued: July 17, 2008

/s/ Leonard Green

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[1] The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX E

UNITED STATES CODE SERVICE

TITLE 29. LABOR

CHAPTER 7. LABOR-MANAGEMENT RELATIONS
LIABILITIES OF AND RESTRICTIONS ON LABOR
AND MANAGEMENT

§ 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations. It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value.

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in *section 13102 of title 49, United States Code*) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions. The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a

labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident

insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with

respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceedings directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor Relations Act, as amended [*29 USCS §§ 151-158, 159-169*], or this Act; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value

paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalties for violations.

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of

the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (*U.S.C., title 28, sec. 381*), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (*U.S.C., title 15, sec. 17*, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

(f) Effective date of provisions. This section shall not apply to any contract in force on the date of enactment of this Act [June 23, 1947], until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds. Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust

funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

HISTORY:

(June 23, 1947, ch 120, Title III, § 302, 61 Stat. 157; Sept. 14, 1959, P.L. 86-257, Title V, § 505, 73 Stat. 537; Oct. 14, 1969, P.L. 91-86, 83 Stat. 133; Aug. 15, 1973, P.L. 93-95, § 1, 87 Stat. 314; Oct. 27, 1978, P.L. 95-524, § 6(d), 92 Stat. 2021; Oct. 12, 1984, P.L. 98-473, Title II, Ch VIII, § 801, 98 Stat. 2131; April 18, 1990, P.L. 101-273, § 1, 104 Stat. 138.)

(As amended Dec. 29, 1995, P.L. 104-88, Title III, Subtitle B, § 337, 109 Stat. 954.)

APPENDIX F

TITLE 29—LABOR

CHAPTER 11—LABOR-MANAGEMENT REPORTING AND DISCLOSURE PROCEDURE

SUBCHAPTER III—REPORTING BY LABOR ORGANIZATIONS, OFFICERS AND EMPLOYEES OF LABOR ORGANIZATIONS, AND EMPLOYERS

§ 432. Report of officers and employees of labor organizations

(a) Filing; contents of report

Every officer of a labor organization and every employee of a labor organization (other than an employee performing exclusively clerical or custodial services) shall file with the Secretary a signed report listing and describing for his preceding fiscal year—

(1) any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which he or his spouse or minor child derived directly or indirectly from, an employer whose employees such labor organization represents or is actively seeking to represent, except payments and other benefits received as a bona fide employee of such employer;

(2) any transaction in which he or his spouse or minor child engaged, directly or indirectly, involving any stock, bond, security, or loan to or from, or other legal or equitable interest in the business of an employer whose employees such labor organization represents or is actively seeking to represent;

(3) any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which he or his spouse or minor child directly or indirectly derived from, any business a substantial part of which consists of buying from, selling or leasing to, or otherwise dealing with, the business of an employer whose employees such labor organization represents or is actively seeking to represent;

(4) any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which he or his spouse or minor child directly or indirectly derived from, a business any part of which consists of buying from, or selling or leasing directly or indirectly to, or otherwise dealing with such labor organization;

(5) any direct or indirect business transaction or arrangement between him or his spouse or minor child and any employer whose employees his organization represents or is actively seeking to represent, except work performed and payments and benefits received as a bona fide employee of such employer and except purchases and sales of goods or services in the regular course of business at prices generally available to any employee of such employer; and

(6) any payment of money or other thing of value (including reimbursed expenses) which he or his spouse or minor child received directly or

indirectly from any employer or any person who acts as a labor relations consultant to an employer, except payments of the kinds referred to in section 186(c) of this title.

(b) Report of certain bona fide investments

The provisions of paragraphs (1), (2), (3), (4), and (5) of subsection (a) of this section shall not be construed to require any such officer or employee to report his bona fide investments in securities traded on a securities exchange registered as a national securities exchange under the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], in shares in an investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], or in securities of a public utility holding company registered under the Public Utility Holding Company Act of 1935, or to report any income derived therefrom.

(c) Exemption from filing requirement

Nothing contained in this section shall be construed to require any officer or employee of a labor organization to file a report under subsection (a) of this section unless he or his spouse or minor child holds or has held an interest, has received income or any other benefit with monetary value or a loan, or has engaged in a transaction described therein.

(Pub. L. 86-257, title II, Sec. 202, Sept. 14, 1959, 73 Stat. 525.)

APPENDIX G

TITLE 29—LABOR

CHAPTER 11—LABOR-MANAGEMENT REPORTING AND DISCLOSURE PROCEDURE

SUBCHAPTER III—REPORTING BY LABOR ORGANIZATIONS, OFFICERS AND EMPLOYEES OF LABOR ORGANIZATIONS, AND EMPLOYERS

§ 433. Report of employers

(a) Filing and contents of report of payments, loans, promises, agreements, or arrangements.

Every employer who in any fiscal year made—

(1) any payment or loan, direct or indirect, of money or other thing of value (including reimbursed expenses), or any promise or agreement therefore, to any labor organization or officer, agent, shop steward, or other representative of a labor organization, or employee of any labor organization, except (A) payments or loans made by any national or State bank, credit union, insurance company, savings and loan association or other credit institution and (B) payments of the kind referred to in section 186(c) of this title;

(2) any payment (including reimbursed expenses) to any of his employees, or any group or committee of such employees, for the purpose of causing such employee or group or committee of employees to persuade other employees to exercise or not to exercise, or as the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing unless such payments were contemporaneously or previously disclosed to such other employees;

(3) any expenditure, during the fiscal year, where an object thereof, directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing, or is to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;

(4) any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing, or undertakes to supply such employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding; or

(5) any payment (including reimbursed expenses) pursuant to an agreement or arrangement described in subdivision (4);

shall file with the Secretary a report, in a form prescribed by him, signed by its president and treasurer or corresponding principal officers showing in detail the date and amount of each such payment, loan, promise, agreement, or arrangement and the

name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made.

(b) Persuasive activities relating to the right to organize and bargain collectively; supplying information of activities in connection with labor disputes; filing and contents of report of agreement or arrangement.

Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly—

> (1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or
>
> (2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;

shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during

which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof. In each such case such information shall be set forth in such categories as the Secretary may prescribe.

(c) Advisory or representative services exempt from filing requirements

Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

(d) Exemption from filing requirements generally

Nothing contained in this section shall be construed to require an employer to file a report under subsection (a) of this section unless he has made an expenditure, payment, loan, agreement, or arrangement of the kind described therein. Nothing contained in this section shall be construed to require any other person to file a report under subsection (b) of this section unless he was a party to an agreement or arrangement of the kind described therein.

(e) Services by and payments to regular officers, supervisors, and employees of employer

Nothing contained in this section shall be construed to require any regular officer, supervisor, or employee of an employer to file a report in connection with services rendered to such employer nor shall any employer be required to file a report covering expenditures made to any regular officer, supervisor, or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer.

(f) Rights protected by section 158(c) of this title

Nothing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 158(c) of this title.

(g) "Interfere with, restrain, or coerce" defined

The term "interfere with, restrain, or coerce" as used in this section means interference, restraint, and coercion which, if done with respect to the exercise of rights guaranteed in section 157 of this title, would, under section 158(a) of this title, constitute an unfair labor practice.

(Pub. L. 86-257, title II, Sec. 203, Sept. 14, 1959, 73 Stat. 526.)

Supreme Court, U.S.
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No. 08-409

In the Supreme Court of the United States

WALTER RALPH MABRY AND ANTHONY MICHAEL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "settlement exception" of 29 U.S.C. 186(c)(2), which provides an affirmative defense to a charge that a union official received payment from an employer in violation of 29 U.S.C. 186(b)(1), requires the defendant to show some level of structure or formality in the settlement to ensure its legitimacy.

2. Whether by rejecting petitioners' interpretation of the "settlement exception" the court of appeals directed a verdict for the government in violation of the Sixth Amendment right to a jury trial.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Arroyo v. *United States*, 359 U.S. 419 (1959) 8, 13
Bailey v. *United States*, 516 U.S. 137 (1995) 9
Brogan v. *United States*, 522 U.S. 398 (1998) 9
Dennis v. *United States*, 384 U.S. 855 (1966) 3
Dixon v. *United States*, 548 U.S. 1 (2006) 15
Grunewald v. *United States*, 353 U.S. 391 (1957) 3
Holloway v. *United States*, 526 U.S. 1 (1999) 9
International Longshoremen's Ass'n v. *Seatrain Lines, Inc.*, 326 F.2d 916 (2d Cir. 1964) 8
James v. *United States*, 550 U.S. 192 (2007) 9
Martin v. *Ohio*, 480 U.S. 228 (1987) 14
McKelvey v. *United States*, 260 U.S. 353 (1922) 15
Muscarello v. *United States*, 524 U.S. 125 (1998) 14
Norfolk & W. Ry. v. *American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991) 9
Patterson v. *New York*, 432 U.S. 197 (1977) 15
Smith v. *United States*, 508 U.S. 223 (1993) 12
Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 14

Cases—Continued: Page

Toth v. *USX Corp.*, 883 F.2d 1297 (7th Cir.), cert. denied, 493 U.S. 994 (1989) 8
United States v. *Phillips*, 19 F.3d 1565 (11th Cir. 1994), cert. denied, 514 U.S. 1003 (1995) 8
United States v. *Santos*, 128 S. Ct. 2020 (2008) 13
United States v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820) 13
Watson v. *United States*, 128 S. Ct. 579 (2007) 12, 13

Constitution and statutes:

U.S. Const.:
Amend. V 14
Due Process Clause 14
Amend. VI 14
Labor-Management Relations Act, 1947, 29 U.S.C. 141 *et seq.*:
29 U.S.C. 186 ..... 2, 7, 8
29 U.S.C. 186(a) 2, 3, 6, 7
29 U.S.C. 186(a)(2) 6
29 U.S.C. 186(b) 6, 7
29 U.S.C. 186(b)(1) 2, 3, 6, 11
29 U.S.C. 186(c) 5, 7, 11, 14
29 U.S.C. 186(c)(2) ..... *passim*
29 U.S.C. 186(c)(3) 12
29 U.S.C. 186(d)(2) 2, 3
18 U.S.C. 371 ..... 2, 3
18 U.S.C. 924(c)(1)(A) 12, 13
18 U.S.C. 1956(a)(1)(A)(i) 13

Statutes—Continued: Page

18 U.S.C. 3282(a) 3
29 U.S.C. 432 10
29 U.S.C. 432(a)(6) 10
29 U.S.C. 433 10
29 U.S.C. 433(a)(1)(B) 10

Miscellaneous:

93 Cong. Rec. 4678 (1947) 8
Department of Labor Jurisdiction to Investigate Certain Criminal Matters, 10 Op. Off. Legal Counsel 130 (1986) 11
Employment Standards Admin., U.S. Dep't of Labor, *Form LM-10, Employer Reports Frequently Asked Questions* (last modified Oct. 26, 2007) <http://www.dol.gov/esa/olms/regs/compliance/LM10_FAQ.htm> 10, 11

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 518 F.3d 442. The opinion of the district court (Pet. App. 23a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2008. A petition for rehearing was denied on June 30, 2008 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on September 26, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioners

were convicted of conspiring to violate the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 186, in violation of 18 U.S.C. 371; and receiving an unlawful payment from an employer while serving as an officer of a labor organization, in violation of 29 U.S.C. 186(a), (b)(1) and (d)(2). Petitioner Mabry was sentenced to 24 months of imprisonment, to be followed by three years of supervised release, and fined $50,000. Petitioner Michael was sentenced to 12 months and one day of imprisonment, to be followed by two years of supervised release, and fined $3000. Pet App. 3a-4a.

1. Petitioners were officers of the Michigan Regional Council of Carpenters (MRCC), a labor organization. Mabry was the executive secretary-treasurer, and Michael, who reported directly to Mabry, was the president and executive director. In 1997, Mabry decided to build a new house. Between January 1998 and December 1998, five carpentry contractors whose employees were represented by MRCC performed construction work on Mabry's house. Mabry received from the contractors over $120,000 worth of discounts below the prevailing market rate on building materials, labor, and related costs. Pet. App. 2a & n.1, 10a; Gov't C.A. Br. 3-22, 55.

One of the contractors was Nelson Mill Company (Nelson Mill), the owner of which had previously negotiated collective bargaining contracts with petitioners when they were representing the MRCC. Although Nelson Mill ordinarily performed finish carpentry and custom millwork only on commercial buildings, it completed the interior trim work on Mabry's house between August and December 1998. In March 1999, Nelson Mill submitted an invoice for $46,117, which covered the cost of labor, materials, and direct overhead but did not in-

clude indirect overhead costs or a profit. Pet. App. 2a-3a; Gov't C.A. Br. 14-18 & n.8.

Petitioners complained to Nelson Mill about the invoiced amount and asked for a reduction. In September 1999, Nelson Mill resubmitted the same invoice with a computer printout detailing the costs, but petitioners again complained and did not pay. On November 30, 1999, Nelson Mill submitted a revised invoice for $26,000, an amount significantly less than the actual costs of the job. In December 1999, Mabry paid that invoice. By accepting the lower amount, Nelson Mill suffered a substantial loss. Pet. App. 3a; Gov't C.A. Br. 19-22.

2. On November 29, 2004, a grand jury sitting in the Eastern District of Michigan returned a two-count indictment charging petitioners with conspiring to violate the LMRA in violation of 18 U.S.C. 371; and receiving an unlawful payment from an employer while serving as an officer of a labor organization, in violation of the LMRA, 29 U.S.C. 186(a), (b)(1) and (d)(2). The conspiracy count was based on petitioners' transactions with all of the contractors on Mabry's house, and the substantive count was based on petitioners' receipt of below-cost construction work from Nelson Mill.[1] Pet. App. 3a.

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[1] Because the indictment was returned on November 29, 2004, only transactions occurring after November 29, 1999, fell within the five-year statute of limitations in 18 U.S.C. 3282(a). The Nelson Mill transaction satisfied that requirement because Nelson Mill submitted the reduced invoice on November 30, 1999, and petitioners paid it in December 1999. Gov't C.A. Br. 21-22; Pet. App. 3a. The conspiracy count fell within the statute of limitations because the Nelson Mill transaction was alleged as an overt act in furtherance. See *Dennis* v. *United States*, 384 U.S. 855, 864 n.8 (1966); *Grunewald* v. *United States*, 353 U.S. 391, 396-397 (1957).

Shortly before trial, petitioners moved to dismiss the indictment and to sever the substantive count on the ground that the conduct it alleged was protected by the "settlement exception" of 29 U.S.C. 186(c)(2), which excludes payments made to settle certain disputes from the statutory prohibition on payments between employers and union officials. Pet. App. 3a; Gov't C.A. Br. 25 & n.15. At a hearing, the district court denied the motions but ruled that Section 186(c)(2) provides an affirmative defense applicable to the settlement of any dispute, even an informal one that had never been the subject of arbitration or litigation. 9/26/05 Tr. 23-24, 36; see Pet. App. 23a.

On reconsideration, the district court reversed its ruling. Pet. App. 23a-36a. The court held that "Section 186(c)(2) applies only if the parties have reached a resolution of a dispute or claim through the adjudicative process, meaning a judgment of a court or an arbitrator's award." *Id.* at 36a. The court thus concluded that "Section 186(c)(2) offers no protective refuge for any parties that resolve a dispute through independent, informal negotiations held solely between the parties themselves." *Ibid.*

Following a trial, the jury convicted petitioners on both counts. The district court denied petitioners' motions for judgments of acquittal. Pet. App. 4a.

3. The court of appeals affirmed. Pet. App. 1a-20a. It rejected petitioners' argument that the informal resolution of the Nelson Mill payment dispute qualified for protection under Section 186(c)(2). *Id.* at 4a-8a.

The court of appeals observed that "[o]ne of the purposes of enacting § 186 was to combat the corruption of the collective bargaining process that occurs when a union employer gives something of value to a union rep-

resentative." Pet. App. 6a. "This purpose would be undermined," the court explained, "if employers and union officials could simply enter into informal agreements, later dispute these agreements, and then make payments in 'settlement' of the dispute." *Ibid.* The court also observed that the other eight exceptions in 29 U.S.C. 186(c) "refer to situations where the way in which the payment is made evidences its legitimacy under [the LMRA]." Pet. App. 6a. Based on "the underlying purpose of § 186 and the statutory scheme of the exceptions," the court "infer[red] that Congress similarly intended that there should be some external evidence of the legitimacy of the payment for the payment to qualify under [the "settlement exception" of] § 186(c)(2)." *Id.* at 7a.

The court drew the same conclusion from the text of Section 186(c)(2). That provision, the court noted, "legalizes three types of payments * * * made to resolve some type of dispute: (1) payments made in satisfaction of the outcome of litigation, (2) payments in satisfaction of the outcome of arbitration, and (3) payments to otherwise resolve a dispute, in the absence of fraud or duress." Pet. App. 7a. The court observed that "[t]he first two categories are specific, referring to structured methods of dispute resolution," while the third category is "more general, serving as a statutory catch-all to encompass payments resulting from less structured means of dispute resolution." *Ibid.* Applying the canon of *ejusdem generis*, the court concluded that "the third category must be constrained by the specificity of the preceding ones, meaning that the third category must be interpreted to require some level of structure or formality in resolving a dispute to evidence the legitimacy of the ensuing payment." *Id.* at 8a. The court declined to

delineate "what degree of structure must be present to trigger the protection of § 186(c)(2)," deeming it "certain that [the requisite structure was] lacking" in the payment to Nelson Mill. *Ibid.*

Judge Keith dissented in relevant part. Pet. App. 14a-20a. He disagreed "with the majority's determination that in order for the 'settlement exception' * * * to apply, the parties must have initiated a structured dispute resolution process." *Id.* at 14a. In his view, "the appropriate interpretation of § 186(c)(2) is that informal settlements of informal disputes are excepted from the general prohibition of § 186 so long as such settlements are made in the absence of fraud or duress." *Id.* at 19a-20a.

ARGUMENT

1. Petitioners contend (Pet. 9-19) that the settlement exception in 29 U.S.C. 186(c)(2) broadly exempts from criminal liability any payment from an employer to a union official to resolve an informal dispute as long as the payment is made in the absence of fraud or duress. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

a. Section 186(b) makes it "unlawful for any person to * * * receive * * * any payment * * * prohibited by" Section 186(a). 29 U.S.C. 186(b)(1). As relevant here, Section 186(a) makes it "unlawful for any employer * * * to pay * * * any money or other thing of value * * * to any labor organization, or any officer or employee thereof, which represents * * * any of the employees of such employer who are employed in an industry affecting commerce." 29 U.S.C. 186(a)(2). Section

186(a) thus prohibits employers from paying anything of value to employees' representatives or union officials, and Section 186(b), in turn, prohibits those officials from receiving such payments.

Section 186(c) provides nine exceptions to those prohibitions. The "settlement exception" in Section 186(c)(2) states that Sections 186(a) and (b) do not apply

> with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress.

29 U.S.C. 186(c)(2).

b. The court of appeals correctly rejected petitioners' contention (Pet. 10) that any payment an employer makes to a union official is protected under Section 186(c)(2) as long as it is characterized as the settlement of an informal dispute and does not involve fraud or duress.

In the government's view, payment by an employer to a union official falls within the "settlement exception" of Section 186(c)(2) only when the payment represents the settlement of an actual controversy presented to a court, arbitrator, or other impartial adjudicator. As the government argued below (Gov't C.A. Br. 29-30), that view is supported by the text of Section 186(c)(2) as well as by its legislative history. During Congressional hearings, Senator Ball, one of the sponsors of the floor amendment that became Section 186, stated that, to qualify for protection under Section 186(c)(2), a payment must be made "in satisfaction of a judgment rendered by

a court, or in compromise of litigation," thus implying that the payment must settle a case or controversy already presented for adjudication. See 93 Cong. Rec. 4678 (1947).

The purpose of the criminal prohibitions in Section 186 supports that interpretation of the "settlement exception." Section 186 "is, in part, a conflict-of-interest statute designed to eliminate practices that have the potential for corrupting the labor movement." *United States* v. *Phillips*, 19 F.3d 1565, 1574 (11th Cir. 1994), cert. denied, 514 U.S. 1003 (1995); see *Toth* v. *USX Corp.*, 883 F.2d 1297, 1300 (7th Cir.) ("It is fairly universally acknowledged that a central purpose of [Section 186] as a whole [is] to prevent employers from bribing union officials."), cert. denied, 493 U.S. 994 (1989). In *Arroyo* v. *United States*, 359 U.S. 419 (1959), this Court noted that Section 186 "was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process," such as "bribery of employee representatives by employers" and "extortion by employee representatives." *Id.* at 425-426. Petitioners' broad reading of Section 186(c)(2) would substantially frustrate those objectives. As the court explained, allowing such informal settlements to qualify under Section 186(c)(2) "would nullify 'the proscriptive effect of the statute . . . since every payment by an employer to a union could be characterized as a settlement of a claim or demand made by the union.'" Pet. App. 6a (quoting *International Longshoremen's Ass'n* v. *Seatrain Lines, Inc.*, 326 F.2d 916, 920 (2d Cir. 1964)).

The court of appeals took a different route to that conclusion. While declining to adopt the government's view, Pet. App. 5a, the court correctly held that "'settlement' [in Section 186(c)(2)] cannot be construed so

broadly as to include the informal resolution of the Nelson Mill payment dispute." *Id.* at 5a-6a. As the court of appeals recognized, the proper interpretation of a statute takes into account "'not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'" *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (quoting *Bailey* v. *United States*, 516 U.S. 137, 145 (1995)). The court of appeals correctly reasoned that the first two categories of payments allowed under Section 186(c)(2) refer to "structured methods of dispute resolution," Pet. App. 7a, and that, consistent with the canon of *ejusdem generis*, the third category should be interpreted also to require "some level of structure or formality in resolving a dispute to evidence the legitimacy of the ensuing payment." *Id.* at 8a. See *James* v. *United States*, 550 U.S. 192, 199 (2007) ("[W]hen a general phrase follows a list of specifics, it should be read to include only things of the same type as those specifically enumerated."); *Brogan* v. *United States*, 522 U.S. 398, 403 n.2 (1998) ("Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.") (quoting *Norfolk & W. Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991)).

Both the government's and the court's readings of the statute are narrower than petitioners' view, which would extend the protection of Section 186(c)(2) to any payment an employer makes to a union official in settlement of any informal dispute provided the payment is unaccompanied by fraud or duress. Because petitioners could not prevail under either the government's or the court of appeals' interpretation, this case does not

squarely implicate the question of which of those approaches is correct.

2. a. There is no disagreement among the courts of appeals on the meaning of Section 186(c)(2), and petitioners do not assert such a conflict. Petitioners argue (Pet. 10-12, 15-16), however, that the court of appeals' decision is inconsistent with guidance published by the Department of Labor concerning the reporting requirements in 29 U.S.C. 432 and 433. Section 432(a)(6) requires an officer of a labor organization to report "any payment of money or other thing of value * * * which he or his spouse or minor child received directly or indirectly from any employer * * *, except any payments of the kind referred to in section 186(c) of this title." 29 U.S.C. 432(a)(6). Section 433(a)(1)(B) requires an employer to report "any payment or loan, direct or indirect, of money or other thing of value * * * to any labor organization or officer * * *, except * * * payments of the kind referred to in section 186(c) of this title[.]" 29 U.S.C. 433(a)(1)(B). On a website addressing "Frequently Asked Questions" about the reporting requirements, the Department of Labor lists payments "in satisfaction of a judgment or arbitration award," as well as payments "to settle a bona fide claim, in the absence of fraud or duress," as examples of transactions that an employer need not report. Employment Standards Admin., U.S. Dep't of Labor, *Form LM-10, Employer Reports Frequently Asked Questions* (last modified Oct. 26, 2007) (*Form LM-10 FAQs*) <http://www.dol.gov/esa/olms/regs/compliance/LM10_FAQ.htm> (Answer No. 19).

Contrary to petitioner's contention, the decision below is not necessarily inconsistent with the Department of Labor's guidance. That guidance does not detail what

constitutes "a bona fide claim" or address whether, as the court of appeals concluded, Section 186(c)(2) requires that the transaction contain some level of formality or structure. More importantly, the Department of Labor is not the agency charged with administering Section 186. See *Department of Labor Jurisdiction to Investigate Certain Criminal Matters*, 10 Op. Off. Legal Counsel 130 (1986). The Department of Labor explicitly cautions on its website, moreover, that the guidance offered there "is intended as compliance assistance[,] * * * is not legal advice, and should not be relied upon as legal advice." *Form LM-10 FAQs*. Of particular importance, the guidance also states that it "does not interpret the provisions of section [186(c)], and conclusions reached by the Department [of Labor] regarding payments of the kind referred to in section [186(c)] would not bind the Department of Justice in carrying out its criminal enforcement responsibilities." *Ibid.* (Answer No. 87). Thus, even if there were a conflict between the decision below and the guidance on the Department of Labor website, that conflict would not warrant this Court's review.

This case would not provide a suitable vehicle for review of that purported conflict, moreover, because petitioners' "claim" against Nelson Mill was not "bona fide," and petitioners therefore could not prevail even under a generous reading of the Department of Labor guidance. The original sum that Nelson Mill billed petitioners for the work performed on Mabry's house did not include indirect overhead costs or a profit. See Pet. App. 3a. If petitioners had simply paid that invoice rather than disputing it, they would have received a thing of value from Nelson Mill in violation of Section 186(b)(1) because Nelson Mill typically charged other customers a significant

mark-up on its labor and materials. See Gov't C.A. Br. 15-16 & n.8; 29 U.S.C. 186(c)(3) (providing exception to criminal liability for "the sale or purchase of an article or commodity at the prevailing market price in the regular course of business"). Petitioners essentially contend that, although they would have committed a crime by accepting that benefit, they should be exempt from criminal liability because they successfully complained about the original invoice and then accepted in "settlement" of that "claim" an even *greater* benefit. This is not a case, therefore, in which an employer and union official disagree informally about an arms-length transaction and the defendant's criminal culpability turns solely on the question whether his receipt of payment in settlement of a "bona fide claim" must be accompanied by sufficient structure or formality to establish its legitimacy.

b. There is no merit to petitioners' contention (Pet. 12-14) that the decision of the court of appeals conflicts with *Watson* v. *United States*, 128 S. Ct. 579 (2007). In that case, which did not involve the LMRA, the Court held that a person who trades drugs to obtain a firearm does not "use" the firearm during and in relation to a drug trafficking crime within the meaning of 18 U.S.C. 924(c)(1)(A). After noting that the statute did not define the term "uses," the Court relied on "the language as we normally speak it," concluding that there was "no other source of a reasonable inference about what Congress understood when writing or what its words will bring to the mind of a careful reader." *Watson*, 128 S.Ct. at 583. The Court rejected the government's argument that failing to treat the receipt of a firearm in exchange for drugs as a "use" of the firearm would create unacceptable symmetry with *Smith* v. *United States*, 508 U.S. 223 (1993), which held that trading a firearm to obtain

drugs constituted "use" of the firearm under Section 924(c)(1)(A). *Watson*, 128 S. Ct. at 585-586. The Court reasoned that "policy-driven symmetry cannot turn 'receipt-in-trade' into 'use.'" *Id.* at 585.

Watson is inapposite here. The court of appeals' interpretation of the language of Section 186(c)(2) is consistent with "ordinary meaning and the conventions of English." *Watson*, 128 S. Ct. at 586. The court of appeals, moreover, did not rely on concerns of "policy-driven symmetry" to override the language of the statute but rather interpreted that language in light of statutory purpose and context. Pet. App. 7a. The court's reasoning was consistent not only with *Watson* but also with *Arroyo*, which, in addressing the same section of the LMRA, observed that "'though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature." *Arroyo*, 359 U.S. at 424 (quoting *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)).

Petitioner is also incorrect in asserting (Pet. 16-19) that the decision below conflicts with *United States* v. *Santos*, 128 S. Ct. 2020, 2024-2025 (2008). There, this Court held that, under the rule of lenity, the term "proceeds" in the money laundering statute, 18 U.S.C. 1956(a)(1)(A)(i), must be construed to refer to profits, rather than receipts, because that term was ambiguous. The Court explained that the "rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Santos*, 128 S. Ct. at 2025 (plurality opinion); *id.* at 2033-2034 (Stevens, J., concurring in the judgment).

Like *Watson*, *Santos* has no bearing on this case. The court of appeals did not find that Section 186(c)(2) was ambiguous. Rather, the court indicated that any

potential ambiguity in that provision was resolved by interpreting the "settlement exception" in a manner consistent with the other exceptions in Section 186(c). See Pet. App. 6a. In any event, the rule of lenity applies only where there is a "grievous ambiguity or uncertainty in the statute" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). Because the court of appeals correctly concluded that the language of the "settlement exception" was not ambiguous when viewed in light of the motivating polices of the statute and the context of Section 186(c), the rule of lenity is inapplicable here.

3. Petitioners contend (Pet. 20-23) that the court of appeals' affirmance of their convictions effectively constituted a directed verdict for the government in violation of the Sixth Amendment right to a jury trial. That contention lacks merit and does not warrant further review.

This Court has explained that "[w]hat the factfinder must determine to return a verdict of guilty [in a criminal case] is prescribed by the Due Process Clause" of the Fifth Amendment. *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993).[2] The Due Process Clause requires only that the government prove beyond a reasonable doubt all of the elements necessary to constitute the crime with which the defendant is charged. *Martin* v. *Ohio*, 480 U.S. 228, 231-232 (1987). Where Congress expressly

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[2] The Court deemed it "self-evident" in *Sullivan* that "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." 508 U.S. at 278.

enacts an affirmative defense to a crime, the "'settled rule'" imposes on the defendant the burden of proving that it applies. *Dixon* v. *United States*, 548 U.S. 1, 13 (2006) (quoting *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922)); *Patterson* v. *New York*, 432 U.S. 197, 210 (1977) ("Proof of the non-existence of all affirmative defenses has never been constitutionally required.").

Petitioners concede that the "settlement exception" in Section 186(c)(2) is an affirmative defense to criminal liability under the statute. See Pet. 21-22. Petitioners therefore bore the burden of proving the defense. The court of appeals simply rejected petitioners' interpretation of Section 186(c)(2) and concluded as a matter of law that petitioners had failed to meet the showing that the provision requires. The court did not engage in any "additional fact-finding steps" regarding an element of the offense, Pet. 22, and therefore did not in any sense direct a verdict for the government.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

WALTER RALPH MABRY AND
ANTHONY MICHAEL,
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v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ARGUMENT	2
I. The interpretation of the settlement exception is an important issue that has not been, but should be, settled by this Court	2
A. The United States does not deny that the statute and its interpretation will impact thousands of union officials and employers	2
B. Without clarification from this Court, union officials and employers attempting to comply with the civil and criminal laws surrounding transactions between them have no clear guidance on how to do so	3
II. The panel majority's failure to consider strict construction and the rule of lenity, in the face of *Watson* and *Santos*, suggests that "the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration."	5
III. Respondent, like the Court of Appeals, draws factual conclusions based on the incomplete trial record and argues that the Nelson Mill settlement would not satisfy any of the available standards	7
CONCLUSION	11

TABLE OF CONTENTS—Continued

Page

APPENDIX

Letter from Solicitor General dated October 2, 2007 ..... 1a

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

American Federation of Musicians v. *Wittstein*, 379 U.S. 171 (1964) 3
Arroyo v. *United States*, 359 U.S. 419 (1959) 6
Bollenbach v. *United States*, 326 U.S. 607 (1946) 11
Dixon v. *United States*, 548 U.S. 1 (2006) ... 8, 9
Lawrence v. *Chater*, 516 U.S. 163 (1996) 2
Mastro Plastics Corp. v. *National Labor Relations Board*, 350 U.S. 270 (1956) 3
Mathews v. *United States*, 485 U.S. 58 (1988) 10
National Labor Relations Board v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953) 3
National Labor Relations Board v. *United Steelworkers of America*, 357 U.S. 357 (1958) 3
Neder v. *United States*, 527 U.S. 1 (1999) ... 11
Perez v. *United States*, 297 F.2d 12 (5th Cir. 1961) 10
Sheet Metal Workers' International Association v. *Lynn*, 488 U.S. 347 (1989) 3
Sullivan v. *Louisiana*, 508 U.S. 275 (1993). 10, 12
United Brotherhood of Carpenters v. *United States*, 330 U.S. 395 (1947) 10
United States v. *Al-Rekabi*, 454 F.3d 1113 (10th Cir. 2006) 10
United States v. *Booker*, 543 U.S. 220 (2005) 8, 12
United States v. *Cook*, 84 U.S. 168 (1872) ... 9

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Freter*, 31 F.3d 783 (9th Cir. 1994) 9
United States v. *Gaudin*, 515 U.S. 506 (1995) 8
United States v. *Grace*, 455 F. Supp. 2d 1133 (D. Mont. 2006) 9
United States v. *Guess*, 629 F.2d 573 (9th Cir. 1980) 9
United States v. *Johnson*, 459 F. 3d 990 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1486 (2007) 10
United States v. *Pedroza*, 750 F. 2d 187 (2d Cir. 1984) 10
United States v. *Phillips*, 19 F.3d 1565 (11th Cir. 1994) 8, 9
United States v. *Rodriguez*, 858 F. 2d 809 (1st Cir. 1988) 10
United States v. *Ruiz*, 59 F.3d 1151 (11th Cir. 1995) 10
United States v. *Ryan*, 350 U.S. 299 (1956).. 3
United States v. *Santos*, 128 S. Ct. 2020 (2008) 2, 5, 6, 7, 11, 12
United States v. *Smith*, 981 F.2d 887 (6th Cir. 1992) 9
Watson v. *United States*, 128 S. Ct. 579 (2008) 2, 5, 6, 11, 12

FEDERAL STATUTES AND RULES

29 U.S.C. § 186(c)(2) .....*passim*
29 U.S.C. § 186(c)(1)-(3) 8, 9
Supreme Court Rule 10 2

IN THE

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WALTER RALPH MABRY AND
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Without contesting that the interpretation of the settlement exception in 29 U.S.C. § 186(c)(2) has far-reaching civil and criminal consequences for thousands of employers and union officials, Respondent ignores the plain meaning of the statute and turns a blind eye toward the Sixth Circuit panel majority's failure to interpret a criminal prohibition in accordance with this Court's most recent directives regarding strict construction, the rule of lenity and the fundamental right of a criminal defendant to have his

guilt determined not by a court of appeals, but by a jury of his peers.

This Court's discretionary review is appropriate where, as here, a court of appeals has "decided an important question of federal law that has not been, but should be, settled by this Court, [and] has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). Moreover, given the panel majority's disregard of this Court's decisions in *Watson* and *Santos*, and the absence of pre-submission briefing below on the jury trial issue, there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and an exercise of this Court's power to grant, vacate and remand is therefore appropriate. *See Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

ARGUMENT

I. The interpretation of the settlement exception is an important issue that has not been, but should be, settled by this Court.

A. The United States does not deny that the statute and its interpretation will impact thousands of union officials and employers.

As the brief of amici curiae Construction Association of Michigan ("CAM") and Michigan Conveyor Manufacturers Association ("MCMA") demonstrates, the panel majority's ruling "clearly causes confusion for Associations such as CAM and MCMA and its union employers in regards to settling bona fide disputes with union officials." Am. Br. 8. Amici further

explain that the *Mabry* decision creates "confusion and uncertainty with respect to the Department of Labor's filing requirements for LM-10 and LM-30 forms" for reporting the transfer of "things of value." Am. Br. 8. If allowed to stand, the Sixth Circuit's decision will impair employers' and labor officials' ability to negotiate various business transactions without incurring excessive legal and other financial costs. This will only undermine many industries that already are in financial despair. The importance of the issues in labor relations and in the administration of the Taft-Hartley Act strongly support a grant of certiorari in this case. *See, e.g., National Labor Relations Board* v. *Local Union No. 1229, Int'l Brotherhood of Electrical Workers*, 346 U.S. 464, 471 (1953) (granting certiorari because of the importance to the administration of the Taft-Hartley Act); *United States* v. *Ryan*, 350 U.S. 299, 300 (1956) (granting certiorari because of the importance of § 302 in the LMRA); *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278 (1956); *National Labor Relations Board* v. *United Steelworkers of America*, 357 U.S. 357, 359 (1958); *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964); *Sheet Metal Workers' Int'l Association* v. *Lynn*, 488 U.S. 347, 349 (1989).

B. Without clarification from this Court, union officials and employers attempting to comply with the civil and criminal laws surrounding transactions between them have no clear guidance on how to do so.

A law-abiding employer or union official looking for compliance guidance would find three separate explications into the settlement exception. First, the gov-

ernment below contended, and the district court on rehearing agreed, that a payment by an employer to a union official falls within the "settlement exception" only when the payment represents the settlement of an actual controversy presented to a court or arbitrator. Br. Opp. 7. Respondent claims to find support for this view in the "text and legislative history" of Section 186(c)(2), but only discusses the legislative history and "purpose" of the underlying prohibition, likely because it is impossible to find support in the text of § 186(c)(2) itself.[1] Br. Opp. 7-8. The court of appeals rejected this definition of the settlement exception, defining the second interpretation: that settlements must bear some level of "structure or formality" to fall within § 186(c)(2) and that the provision cannot "be construed so broadly as to include the informal resolution of the Nelson Mill payment dispute." Br. Opp. 8-9. Respondent finds support for this proposition in the doctrine of *ejusdem generis*. Br. Opp. 9. Third, the DOL's website provides that the settlement exception applies to payments made "in satisfaction of a judgment or arbitration award," as well as payments "to settle a bona fide claim, in the absence of fraud or duress." Br. Opp. 10.

Respondent skirts the issue of which interpretation is correct, noting only that "petitioners could not prevail under either the government's or the court of appeals' interpretation[.]" Br. Opp. 9. Respondent avoids

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[1] In response to a request by Petitioner Mabry that the Solicitor General's office confess error, the solicitor general's office stated that the district court's opinion contained "unnecessarily broader language . . . to the effect that the settlement exception requires a settlement reached 'through the adjudicative process, meaning by a judgment of a court or an arbitrator's award.'" Appx. 2a.

entirely the merits of the DOL's construction, declaring that "[c]ontrary to petitioner's contention, the decision below is not *necessarily* inconsistent with the Department of Labor's guidance."[2] Br. Opp. 10 (emphasis added). This is especially troubling because even those union officials and employers who specifically seek out, and comply with, the DOL's guidance could face indictment if the settlement they reach lacks the unspecified degree of structure or formality required by the Sixth Circuit opinion, or does not involve a settlement in the context of pending litigation or arbitration, as the government insists must occur to trigger the exception.

II. The panel majority's failure to consider strict construction and the rule of lenity, in the face of *Watson* and *Santos*, suggests that "the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration."

The Sixth Circuit panel majority ignored this Court's recent directive that the starting point for construing an undefined term is "language as we normally speak it." *Watson* v. *United States*, 128 S.Ct. 579, 583 (2008). The plain meaning of the settlement exception extends its protection broadly to all "informal settlements of informal disputes . . . so long as such settlements are made in the absence of fraud

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[2] Respondent's second argument regarding the DOL guidance is a red herring. Petitioners never contended that the DOL is responsible for administering the criminal provisions in § 186. Petitioners explained that in connection with reporting requirements—which are administered by the DOL—the DOL offers its interpretation of § 186 to identify payments that need not be reported, and, obviously, therefore are not criminal.

or duress," as was found by the panel dissent. Pet. Appx. 19a-20a. Yet, the panel majority never addressed the plain language of § 186(c)(2), and instead focused on doctrines of statutory construction that are applicable only when the statutory language is unclear.

Respondent attempts to distinguish *Watson* by contending that the court of appeals' interpretation is "consistent with ordinary meaning and the conventions of English." Br. Opp. 13. In analyzing § 186(c)(2), Respondent does not begin with the statute's plain language, as mandated by *Watson*, but argues instead that the "proper interpretation of a statute takes into account not only the bare meaning of the critical word or phrase but also its placement and purpose in the statutory scheme." Br. Opp. 9. It then relies on *ejusdem generis*—not plain meaning—to support the panel majority's conclusion that some level of structure or formality is required. Br. Opp. 9. Respondent cites *Arroyo* v. *United States* for the proposition that "penal laws . . . are not to be construed so strictly as to defeat the obvious intention of the legislature." 359 U.S. 419, 424 (1959). In *Arroyo*, however, this Court applied the statute's plain meaning in favor of a defendant charged with violating the LMRA—rather than relying on purported "legislative intent" to condemn him. 359 U.S. at 424-425.

The Sixth Circuit similarly did not consider this Court's lenity teachings in *United States* v. *Santos*, 128 S.Ct. 2020 (2008), decided after the panel majority's opinion was issued. Contrary to Respondent's assertion, lenity does not apply "only where there is a grievous ambiguity or uncertainty in the statute, such that after seizing everything from which aid can

be derived, the Court can make no more than a guess as to what Congress intended." Br. Opp. 14. Rather, lenity simply requires "ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Santos*, 128 S.Ct. at 2025. Ambiguity means that "[u]nder either of the word's ordinary definitions, all provisions . . . are coherent; no provisions are redundant; and the statute is not rendered utterly absurd." *Id.* In such an instance, the "tie must go to the defendant." *Id.* The panel majority concluded that § 186(c)(2) was ambiguous, both before and after applying standard canons of statutory interpretation. Pet. Appx. 6a. While Petitioners believe that the plain meaning of the statute compels their conclusion, the fact that the government, the district court's two opinions, the court of appeals majority and dissent, and the Department of Labor's guidance interpret the statute in conflicting ways suggests that there is confusion. Respondent never asserts that the interpretation propounded by Petitioners is not consistent with § 186(c)(2)'s plain language, and contends only that the panel majority's position is "consistent" when viewed through the lens of *ejusdem generis*. Further speculation regarding a "dubious congressional intent" is impermissible. *Santos*, 128 S.Ct. at 2026. Here, as in *Santos*, the tie must go to the defendants.

III. Respondent, like the Court of Appeals, draws factual conclusions based on the incomplete trial record and argues that the Nelson Mill settlement would not satisfy any of the available standards.

Rather than shedding light on which interpretation of § 186(c)(2) the United States believes is accurate, Respondent claims that "this case would not provide

a suitable vehicle for review of that purported conflict . . . because petitioners' 'claim' against Nelson Mill was not 'bona fide . . .' Br. Opp. 11. Petitioners have argued throughout the case that this settlement was the result of a bona fide dispute. More importantly, in making this contention, Respondent, like the Court of Appeals, disregards the fact that Petitioners were denied a jury determination of whether their conduct satisfied the settlement exception.

The Constitution "protects every criminal defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *United States* v. *Booker*, 543 U.S. 220, 230 (2005). Moreover, the Sixth Amendment requires that criminal convictions rest upon a jury determination that the defendant is guilty of every element of the crime, beyond a reasonable doubt. *Id.*, *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995). A properly instructed jury, not a Court of Appeals, is the appropriate body to determine whether, as a factual matter, Petitioners' settlement with Nelson Mill was protected by the settlement exception. It was improper for the courts below to deprive the defendants of a jury trial on factual issues like whether the Nelson Mill settlement was the settlement of a bona fide claim, or even whether there was sufficient "structure or formality" in the settlement if that is, in fact, required by the statute.

Respondent attempts to relieve the government of its responsibility by claiming that a defendant bears the burden for proving that an affirmative defense applies. Br. Opp. 15, citing *Dixon* v. *United States*, 548 U.S. 1, 13 (2006). Petitioners contend that the settlement exception is more akin to an element of

the crime than an affirmative defense.[3] Regardless, the opinion in *Dixon*, based on the unique defense of duress,[4] is inapposite here. The defendant in *Dixon* received a jury instruction on her proffered theory of defense; she simply contended that the burden of proof had not been allocated properly. 548 U.S. at 4-5. By contrast, the district judge in Petitioners' trial removed the theory of defense from the case before the trial even started, on a ground that the court of appeals has now rejected. Even if Petitioners had the burden of proving to a properly instructed jury that the defense applied, Petitioners' jury never had a chance to consider whether Petitioners' conduct was protected by the settlement exception because the trial judge believed that the only covered settlements

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[3] As a matter of the language employed in the statute, the "exceptions" in §§ 186(c)(1)-(3) involve payments that are always legal and cannot be treated as mere "exceptions" or "affirmative defenses" to otherwise illegal conduct. *See United States* v. *Phillips*, 19 F.3d 1565, 1579 (11th Cir. 1994) ("Section 186(c) contains two types of exceptions. The first three exceptions, sections 186(c)(1)-(3), describe payments that do not have the potential for corrupting the labor movement.") Instead, these "exceptions" are "so incorporated with the language defining the offence (sic)" that they are necessary to the definition of the prohibition itself. *See United States* v. *Cook*, 84 U.S. 168, 173 (1872).

[4] Common law has long required that a defendant bear the burden of proving the existence of duress. *Dixon*, 541 U.S. at 13. For other defenses, once the defendant has "go[ne] forward with sufficient evidence to raise the exception as an issue," the prosecution must prove the inapplicability of the defense beyond a reasonable doubt. *United States* v. *Grace*, 455 F. Supp. 2d 1133, 1138 (D. Mont. 2006); *United States* v. *Smith*, 981 F.2d 887, 891-892 (6th Cir. 1992); *United States* v. *Freter*, 31 F.3d 783, 789 n. 6 (9th Cir. 1994); *United States* v. *Guess*, 629 F.2d 573, 576-577 (9th Cir. 1980).

were those achieved through litigation or arbitration—neither of which was present in the context of the Mabry/Nelson Mill dispute.[5]

The panel majority's decision, in effect, directed a verdict for the prosecution, based on what it was able to glean from an incomplete trial record. The United States, in its brief in opposition, seeks to do the same thing, albeit on a different factual theory: assert that, factually, the dispute was not sufficiently "bona fide" to satisfy the settlement exception. Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the prosecution, no matter how overwhelming the evidence. *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993); *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 408 (1947). Indeed, "absent voluntary waiver of the jury right,

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[5] In *Mathews* v. *United States*, this Court reasoned that a defendant is entitled to a jury instruction "when there exists evidence sufficient for a reasonable jury to find in his favor." 485 U.S. 58, 63 (1988). Without further guidance, however, the circuits are conflicted regarding when the evidence is "sufficient." Some circuits conclude that trial courts are not gatekeepers. *See, e.g., United States* v. *Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995); *Perez* v. *United States*, 297 F.2d 12, 15-16 (5th Cir. 1961); *United States* v. *Pedroza*, 750 F.2d 187, 204-205 (2d Cir. 1984); *United States* v. *Rodriguez*, 858 F.2d 809, 812, 814 (1st Cir. 1988). Other circuits "respect the trial judge's role as gatekeeper[.]" *United States* v. *Al-Rekabi*, 454 F.3d 1113, 1122-1123 (10th Cir. 2006) Others hold that the *Mathews* test requires a "low evidentiary threshold" of "some foundation in the evidence, and something more than a mere scintilla." *United States* v. *Johnson*, 459 F.3d 990, 994 (9th Cir. 2006), cert. denied, 127 S.Ct. 1486 (2007). Regardless of the correct standard, Petitioners' trial judge could not have applied it because he interpreted the settlement exception in a manner that Respondent concedes was inappropriate.

the Constitution does not trust judges to make determinations of criminal guilt." *Neder* v. *United States*, 527 U.S. 1, 32 (1999) (Scalia, J. dissenting).[6] As this Court held in *Bollenbach* v. *United States*, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in federal court." 326 U.S. 607, 614 (1946). An exercise of this Court's discretionary review is necessary to enforce the Sixth Amendment right to trial by jury.

CONCLUSION

With respect, since the district judge, the majority and dissenting judges of the Sixth Circuit, the United States Department of Labor, the Solicitor General and the former Assistant Attorney General for the Criminal Division (albeit one of the defense lawyers in this case) all reached conflicting interpretations of § 186(c)(2), the employers and labor officials covered by the Taft-Hartley Act do not stand a chance. Surely the language of the settlement exception, if not clear under *Watson*, is ambiguous and warrants analysis under *Santos*. American notions of due process and fair notice of malum prohibitum criminality require no less than respect for the defendants' right to a jury determination of the facts, with a

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[6] Petitioners' case differs sharply from the "harmless error" result in *Neder*. In contrast to *Neder*, in which the defendant underreported $5 million on his tax returns, failed to contest materiality at trial and did not suggest that he would introduce any evidence bearing upon that issue, Petitioners' effort to raise the settlement defense was thwarted because the trial judge found as a matter of law that Petitioners were not permitted to raise the defense, introduce evidence or have the matter presented to the jury with a proper jury instruction.

proper instruction concerning the settlement exception. For the reasons stated herein and in their initial petition, Petitioners request that this Court grant a writ of certiorari. In the alternative, Petitioners request that the Court grant certiorari, vacate the lower court's holding and remand for reconsideration in light of *Watson*, *Santos*, *Sullivan* and *Booker*.

Respectfully submitted,

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February 9, 2009

APPENDIX

APPENDIX

[Logo]

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

October 2, 2007

James K. Robinson, Esq.
Cadwalader, Wickersham & Taft LLP
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Re: United States v. Mabry, No. 06-2324 (6th Cir.)

Dear Mr. Robinson:

This letter is in response to your letter dated July 23, 2007, regarding United States v. Mabry, No. 06-2324, which is pending on appeal before the U.S. Court of Appeals for the Sixth Circuit. You have asked the Department to confess error with respect to the district court's interpretation of 29 U.S.C. § 186(c)(2), the settlement exception to the prohibition against a labor official seeking or receiving a "thing of value" from an employer under the Taft-Hartley Act.

We have carefully reviewed the proposed construction of Section 186(c)(2) set forth in your letter and the brief you filed in the Sixth Circuit. We believe that the better reading of the statute is that the settlement exception in Section 186(c)(2) requires that "the payment must have been made in settlement of an actual controversy that was filed and pending in court, or presented to an arbitrator or impartial adjudicator prior to settlement," as the United States Attorney's office argued in its brief (Br. 29-30) filed in the Sixth Circuit. No binding authority, or evidence of legislative intent, contradicts that interpretation, and it is both consistent with the text of the statute

and Congress's purpose in enacting the settlement exception. As such, notwithstanding some unnecessarily broader language in the district court's opinion to the effect that the settlement exception requires a settlement reached "through the adjudicative process, meaning by a judgment of a court or an arbitrator's award," Op. 13, we believe that the court of appeals should resolve the issue based on the parties' briefs and an adversary presentation. Accordingly, we decline to confess error in this case.

Thank you for bringing this issue to the Department's attention.

Sincerely,

/s/ Michael R. Dreeben
Michael R. Dreeben
Deputy Solicitor General

cc: Christopher P. Yates, Esq.
Counsel for Appellant Anthony Michael

110

(2)

No. 08-409

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IN THE

Supreme Court of the United States

WALTER RALPH MABRY and
ANTHONY MICHAEL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* CONSTRUCTION ASSOCIATION OF MICHIGAN AND MICHIGAN CONVEYOR MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	2
REASONS FOR GRANTING THE WRIT	4
The Sixth Circuit Clearly Erred, By Removing Pre-Existing Safe Harbors For Good Faith Resolutions Of Commercial Disputes Between Employers And Labor Officials Provided For By Taft-Hartly Act 29 U.S.C. §186(c)(2). The Sixth Circuit Opinion Implants An Undefined Requirement That Good Faith Resolutions Of Commercial Disputes Have "Some Level Of Structure Or Formality" To Avoid Criminality	4
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

United States v. Mabry, 518 F.3d 442 (6th Cir. 2008).....3, 4, 9

FEDERAL STATUTES

29 U.S.C. §186(c)(2).....3, 4, 7, 8, 9

29 U.S.C. §432 9

29 U.S.C. §432(a)(6)..... 9

29 U.S.C. §433 9

29 U.S.C. §433(a)(1)(B)..... 9

29 U.S.C. §439 9

RULES

Supreme Court Rule 37.2..... 1

Supreme Court Rule 37.6..... 1

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BRIEF OF *AMICUS CURIAE* CONSTRUCTION ASSOCIATION OF MICHIGAN AND MICHIGAN CONVEYOR MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONERS

Pursuant to this Court's Rule 37.2, *amicus curiae* respectfully files this brief in support of the petition for certiorari.[1]

[1] Pursuant to this Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amicus curiae*, and their consent letters are on file with the Clerk's Office.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Construction Association of Michigan (CAM) is the oldest and largest regional construction association in North America. CAM has over 3,300 corporate construction companies as members. CAM's membership includes many of the construction industry's largest general contractors some of which have published sales figures in excess of a billion dollars. CAM's membership is comprised of general contractors, subcontractors such as mechanical, electrical and steel erection contractors, equipment suppliers, material suppliers, and architectural and engineering firms. CAM offers this diverse membership: health, disability and workers compensation insurance, a credit union; investment services; education and safety training; a monthly magazine, social events; and a labor relations service. It is through the labor relations program that CAM acts as a collective bargaining agent for employers. CAM, on behalf of those employers who have appointed CAM as their collective bargaining agent, negotiates labor contracts with unions representing carpenters, cement masons, laborers and operating engineers. Thereafter, CAM interprets and administers these labor contracts. Petitioners Mabry and Michael are not members of CAM. Further, CAM members are not bound by the views taken by CAM as *amicus*.

The Michigan Conveyor Manufacturers Association (MCMA) is an association of union equipment conveyor manufacturers. Its members employ union workers. As a service to its members it acts as the collective bargaining agent on behalf of employers. It negotiates labor contracts with unions representing operating engineers, iron workers, and millwrights.

MCMA also keeps its membership informed regarding changes with safety standards, economic conditions and laws which affect the manner how members conduct their business. Petitioners Mabry and Michael are not MCMA members. Further, the members of MCMA are not bound by the views taken by MCMA as *amicus*.

CAM and MCMA have a strong interest in any case that affects how they and their members conduct business in the construction industry. CAM and MCMA have a particularly strong interest in cases involving the interpretation of the settlement exceptions of the Taft-Hartley Act.

Further, CAM and MCMA believe that as associations which consist of union employers and acts as the employers collective bargaining agent and contract administrator, they must seek clarification when judicial opinions cause confusion or uncertainty.

The Sixth Circuit Court of Appeals Decision in *US v Walter Mabry, et al,* 518 F.3d 442 (6th Cir. 2008) removes the pre-existing safe harbor for good faith resolutions of commercial disputes between employers and labor officials provided by 29 U.S.C. section 186(c)(2). The *Mabry* opinion implants into the Taft-Hartley Act an undefined requirement that good faith resolutions of commercial disputes have, "some level of structure or formality" to avoid criminality.

Furthermore, the *Mabry* decision creates further confusion and uncertainty with respect to the Department of Labor's filing requirements for LM-10 and LM-30 forms for the reporting the transfer of "things of value". Prior to the *Mabry* decision, a private resolution of a bona fide dispute between a labor union official and/or employer need not be reported

on said forms. After *Mabry* one is unsure when the LM-10 and LM-30 forms should be filed. In the event the settlement lacks a sufficient level of formality and said forms have not been filed, potentially subjects a party to fines of not more than $10,000.00 or imprisonment of not more than a year, or both.

The uncertainty and confusion caused by the *Mabry* decision needs to be corrected. For the foregoing reasons, CAM and MCMA now files this amicus curiae brief in support of the petition for certiorari.

REASON FOR GRANTING THE WRIT

The Sixth Circuit Clearly Erred, And Created Confusion And Uncertainty In The Unionized Labor Construction Industry By Removing The Pre-Existing Safe Harbor For Good Faith Resolutions Of Commercial Disputes Between Employers And Labor Officials Provided By The Taft-Hartley Act, 29 U.S.C. §186(c)(2).

The Opinion and Judgment entered by the Sixth Circuit Court of Appeals on March 3, 2008 in *US v Walter Ralph Mabry, et al*, 518 F.3d 442 (6th Cir. 2008) does directly affect how associations, collective bargaining agents, administrators, employers of unionized labor and union officials conduct business.

To understand the gravity of the Sixth Circuit error, it is necessary to understand the basic operations of CAM and MCMA.

CAM is the larger of the two organizations, both in number of members and services provided. CAM is essentially the voice of the construction industry in the Great Lakes Region. It publishes and mails a high end monthly magazine to its members. CAM

also created and administers an annual construction expo for construction trade exhibitors. CAM through its magazine, website, e-mails and faxes, alerts its members to changes in the state and federal law which affect their business.

CAM also provides numerous services which members can elect to participate in or utilize. Said services include, but are not limited to, safety services; project bidding reports; education classes/ seminars; personal and commercial loans; social events (golf, bowling, annual meetings); financial planning; insurance programs (health, auto, home and workers compensation); Annual Construction Industry Expo; and CAM labor relation services, wherein CAM acts as the collective bargaining agent for its union employers and administrator of the negotiated contract.

MCMA is a specialty association comprised of unionized conveyor manufacturer employers. These members utilize MCMA as their collective bargaining agent and administrator of the negotiated contract. MCMA also keeps its members updated on changes with the law and safety requirements through an annual publication.

It is through all the foregoing commercial transactions that the Associations have had or could lead to bona fide disputes between CAM or MCMA and a union official.

First and foremost CAM and MCMA come in direct contact with union officials when acting as the employers collective bargaining agent during labor contract negotiations. Thereafter, CAM and MCMA administer these contracts. As part of the administration of the contracts, CAM and MCMA are

involved in the hearing of grievances. The aforedscribed negotiations and grievance hearings are typically stressful and emotionally charged. It is foreseeable that bona fide dispute between a CAM or MCMA negotiator and a union official could arise. Claims of assault, battery or slander could be alleged by one or both parties when negotiations and grievance hearings become too heated. There have been incidents of strong words and physical contact during grievance hearings involving other associations and union officials.

Secondly, CAM and MCMA by virtue of their employers agency position, come in contact with union officials when said officials participate in: Construction Industry Expo, social functions, education and training seminars, use the Association's credit union services for loans or mortgages, obtain insurance or advertize in the Association magazine. It is foreseeable a union official could suffer a personal injury, dispute an invoice, object to location of one's exhibit at a trade show, default on a loan or mortgage, or have a dispute over insurance coverage or take issue with location of an ad in CAM's magazine.

Thirdly, CAM's and MCMA's union employer members, could foreseeably become embroiled in a dispute with a union official. A union official would use only unionized companies to perform work at their residence. Assume a union official renovating a residence. It is easily foreseeable a dispute arising from the work could develop such as: a claim for extra work, non-payment, defective performance, personal injury. All of which are legitimate bona fide disputes.

Finally, CAM and MCMA endeavor to keep its membership informed with changes in the law which

affect how a company would conduct its business. Such updates would be conveyed to the members through seminars, classes, news bulletins, magazine articles, website postings and e-mails. The problem CAM and MCMA now have is that they do not know how to advise its members regarding settling bona fide disputes with union officials absent fraud or duress. Due to the Sixth Circuit's Opinion in *Mabry* there is now confusion and uncertainty in settling disputes.

Prior to the Sixth Circuit Court of Appeals Decision on *Mabry* all of the foregoing disputes could have been resolved knowing that a safe harbor existed in the Taft-Hartley Act 29 U.S.C. §186(c)(2). The pertinent section unambiguously states:

> 29 U.S.C. §186(c)(2):
>
> (c) Exceptions
>
> The provisions of this section shall not be applicable . . .
>
> (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; . . .

The Sixth Circuit Panel Majority in its analysis of the *Mabry* facts determined that the cited exception is ambiguous. It then went on to decide that the exception of 29 U.S.C. §186(c)(2) must be read to "require some level of structure or formality in resolving a dispute to evidence the legitimacy of the

ensuing payment". The panel majority then failed to define what degree of structure or formality is required to obtain the safe harbor benefits of §186(c)(2).

This ruling clearly causes confusion for Associations such as CAM and MCMA and its union employers in regards to settling bona fide disputes with union officials. In light of the majority panels' ruling should CAM, MCMA, union employers and union officials file a lawsuit, a demand for arbitration for each and every legitimate dispute which it seeks to settle so that it gives rise to a satisfactory level of structure or formality? The simple answer is no. Such a policy would burden already overloaded state and federal dockets; cause unnecessary expense to associations, unions and employers and slow the process of settlement to a snails pace.

It is the position of CAM and MCMA that the proper reading and interpretation of §186(c)(2) was proffered by *Mabry's* dissenting Judge Keith. Judge Keith in his dissent states:

> In other words, if Congress had intended to require union officials to initiate formal proceedings for the settlement exception to apply, Congress would have said so. The absence of the words "formal litigation" or "arbitration" and the insertion of the words "claim" and "dispute" into the second section of § 186(c)(2) suggests that Congress did not actually intend to require union officials and employers to engage in formal adjudicative processes to avoid criminal liability. The requirement was only that the claim and its settlement be bona fide, i.e., "in the absence of fraud or duress." Thus, the plain language of the statute together with the discernable congressional intent of § 186 suggest that § 186(c)(2), the

> settlement exception, should be read to allow the settlement of bona fide disputes between an employer and a union official as long as both the dispute and settlement are in the absence of fraud or duress. *United States v. Mabry*, 518 F.3d 442, 452 (6th Cir. 2008).

CAM and MCMA agree with Judge Keith's rationale. Informal settlements are protected by §186(c)(2) so long as these settlements are concluded in the absence of fraud or duress. If the *Mabry* decision is left to stand it will have a continuing and negative effect upon bona fide settlements. This *amicus* prays this Honorable Court correct the improper interpretation of §186(c)(2) by the majority panel in *Mabry*.

Unfortunately, the affect of the *Mabry* decision reaches even further. Under 29 U.S.C. §§432, 433 labor officials and employers are requested to report receipt of payment of things of value exchanged between them. A willful violation of this law can result in a fine up to $10,000.00 and a year in prison. See 29 U.S.C. §439. However, settlement payments pursuant to 29 U.S.C. §186(c)(2) are exempt from said reporting requirements. See 29 U.S.C. §§432(a)(6) and 433(a)(1)(B).

It appears nonsensical that the majority in *Mabry* would require "structure or formality" to settlements, where the Department of Labor does not. The *Mabry* decision creates confusion and uncertainty regarding resolution of disputes between union officials and employers. It needs to be rectified.

The *Mabry* decision as a matter of policy is a disaster. This Honorable Court should not allow the decision to stand. Accordingly, this Court should grant the Petitioners Writ.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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